CASE NO. 93-101

JUN 25 1993
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IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1993

DONALD B. GATES, and
EVA M. GATES — PETITIONERS

v.

PORT SAN LUIS HARBOR DISTRICT; JACK RODIN, JR.; MARLIN STEBBINS; NORMAN COY, JR.; MATT COLLAR; BILL BARROW; WILLIAM KING; STEWART JENKINS; GERARD PARSONS; JIM CHAMBERS; JIM BLECHA; and DENNIS JOHANSEN

RESPONDENTS

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX

PETITION FOR WRIT OF CERTIORARI

DONALD B. GATES and
EVA M. GATES
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Petitioners Appearing in Propria Persona

QUESTIONS PRESENTED FOR REVIEW

Whether the trial court deprived Petitioners of Due Process and Equal Protection of the law under the Fourteenth Amendment of the United States Constitution, by depriving Petitioners of legal counsel; tampering with the jury and jury instructions; and improperly switching jury verdict forms resulting in misconduct amounting to a crime against public justice under Title 18, Section 1503 and 1505 of the United States Code, California Government Code 6200-6201, California Penal Code 115, 182 and 184.

Whether the trial court deprived Petitioners of Due Process and Equal Protection of the law under the Fourteenth Amendment of the United States Constitution by depriving Petitioners of their claim for recovery by failing to follow applicable California Tort Claim law.

Whether the trial court deprived Pe-

titioners of Due Process and Equal Protection of the law under the Fourteenth Amendment to the United States Constitution by improperly discriminating against petitioners and having improper ex-parte communications with counsel for opposing parties.

Whether the trial court deprived Petitioners of Due Process and Equal Protection of the law under the Fourteenth Amendment to the United States Constitution by failing to take steps to fully disclose matters to Petitioners and properly inform the jury in order to avoid a miscarriage of justice.

Whether the trial court deprived Petitioners of Due Process and Equal Protection of the law under the Fourteenth Amendment to the United States Constitution by failing to apply the doctrine of joint and several liability in determining proper parties and damages.

Whether the appellate court deprived

Petitioners of Due Process and EqualPro-
tection of the law under the Fourteenth
Amendment of the United States Constitution
by failing to render a decision on conspiracy
and misconduct of court and counsel as to un-
lawful interference with court proceedings
and due administration of justice; by fail-
ing to render a decision, adhere to law and
follow precedent of prior Supreme Court de-
cision on same point of law; by its misin-
terpretation and failure to follow applica-
ble state statutes and law constitutes dis-
criminarion against Petitioners where if
followed would have furnished a protection
guaranteed by the constitution.

Whether, short of other lawsuits being
filed, this court is the only source of re-
lief available to Petitioners and the only
court with the power and authority to act
on the seriousness of what court and counsel
have perpetrated against the public and its
adverse effect on the court's loss of judic-

ial reputation by their actions. These issues are important enough to warrant Supreme Court attention and petitioners request a general review of the entire case, as it came out of the court of appeals and the San Luis Obispo County Superior Court, and not restrict the review to only the federal questions presented, pursuant to 28 USC 1651.

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CASE NO. _____

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PORT SAN LUIS HARBOR DISTRICT; JACK RODIN, JR.; MARLIN STEBBINS; NORMAN COY, JR.; MATT COLLAR; BILL BARROW; WILLIAM KING; STEWART JENKINS; GERARD PARSONS; JIM CHAMBERS; JIM BLECHA; and DENNIS JOHANSEN

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX

Donald B. Gates and Eva M. Gates, petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Second Appellate District, Division Six.

Opinions Below

The Opinion of the Court of Appeal, dated December 9, 1992, whose judgment is herein sought to be reviewed, is Civil No. B057338 App.1a; San Luis Obispo county Superior Court No. 61331. The Court of Appeal denied Rehearing on January 5, 1993, App.69a. On March 15, 1993, the California Supreme Court filed extension of time, App.71a; for Review on March 31, 1993, App.77a. Petitioners filed Motion for Stay of Issuance of Remittitur on March 26, 1993. The Court of Appeal issued Remittitur on April 5, 1993, App.78a, and denied Petitioners Motion for Stay of Remittitur on April 6, 1993 based on grounds of "No Jurisdiction," App.79a. The Opinion is unpublished and is re-printed in the separate appendix to this petition, App.1a.

Judgment after trial by jury, filed January 28, 1991 and interlocutory judgments and orders of the lower court of appeals and others omitted from the Opinion, reprinted in the separate appendix to this petition, App.46a-86a.

STATEMENT OF JURISDICTION

Jurisdiction is conferred upon this Honorable Court by 28 USC 1257(a); 1254(1);1331;1651 and 2403(b) of the United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

U.S. Constitution, Amendment 14. App.187a; California State Constitution, Article VI, Section 13, App.191a; 18 USC 1503, App.234a and 18 USC 1505, App.235a.

STATEMENT

Preliminarily, petitioner respectfully requests the Court to note that time is of the essence in this case. The statute of limitations will expire December 31, 1993, for filing suit against the judges, San Luis County Superior Court, defendants and their counsel, in the event the agencies who have jurisdiction fail to prosecute the issues. Petitioners are ready to meet any schedule for briefing and oral argument that the Court may set.

STATEMENT OF THE CASE

In October 1985, the Gates brought their vessel, the Endless III, which is their home, to Port San Luis Harbor District for cleaning and applying anti-fouling paint to the bottom of the boat. The contract with the Port was for hauling the vessel, only. During the contracted employment for the haulout defendants

damaged the vessel while in defendants custody and control.

The Gates filed this action on April 17, 1986 against the District, a public entity, five of its employees, its Chief Executive Officer and its Board of Commission for negligence, res ipsa loquitur, premises liability, breach of contract, bailment, special and consequential damages; emotional distress, loss of use and diminution in value. Gates attached a copy of the contract, which contains a unilateral attorney fee and cost agreement, to the complaint App.213a. The District, only, filed a cross-complaint against both plaintiffs, for payment on the contract with Donald B. Gates.

For five years the lower court prevented this case from coming to trial. After motion to set a trial date, the Presiding Judge, Warren C. Conklin, set a

trial date for March 20, 1990. The attorneys stipulated to continue the trial date to July 17, 1990, App.80a-83a. At the scheduled time for trial, neither attorney appeared in court. Plaintiffs, being present in court, intervened when Judge Conklin was in the process of taking the case off the civil active list, and obtained a new trial date of December 3, 1990. Thereafter the court granted plaintiffs' attorney permission to withdraw, 70 days before the new trial date of December 3, 1990. The court subsequently denied plaintiffs, motion to reopen discovery even though plaintiffs were forced to prepare the case for trial themselves App.84a-87a. This matter was brought to the attention of the court of appeal, AOB 26-27, ARB 17. Due to the five year rule to bring a case to trial, plaintiffs were forced to accept the only visiting judge offered by the court.

Trial by jury ensued in the temporary courtroom in the Veteran's Memorial Building with visiting judge R. Donald Chapman presiding, on negligence, premises liability and breach of contract, as to the District and Jack Rodin, Jr. only, the court having dismissed all other defendants by summary judgment, summary adjudication, judgment on the pleadings, nonsuit and directed verdict, app.56a-66a.

During trial Judge Chapman coerced petitioners into withdrawing common carrier, Count 2, of the Bailment cause of action of the Complaint. No written request for dismissal of bailment cause of action was submitted, nor was an order issued. The jury was not properly charged regarding bailment and did not render a decision on this cause of action. This was brought to the attention of the trial court in Plaintiffs' Objection filed on January 2, 1991, App.126a, and brought to

the court of appeal's attention, AOB 17-18. The appellate Opinion made the determination the trial court should have made, that Port San Luis Harbor District is a common carrier, App.33a-34a, therefore within the doctrine of strict liability.

The court hired the visiting judge for 5 days. Both parties had estimated the trial would require eight days to two weeks. The judge being unavailable forced petitioners to accept an 18 day adjournment before their case in chief had been completed. A second adjournment of 4 days was granted by the court after the reading of jury instructions. The instructions read by the trial judge on December 28, 1990, before the adjournment, were not reread to the jury prior to deliberation on January 2, 1991.

The trial court refused to give plaintiffs' requested jury instructions, "Concurring Causes", Baji 3.77, 3.78,

3.80, App.128a, 204a-206a, and Baji 3.45, App.127a,202a, "Violation of Statutes, Ordinances and Safety Orders, stating, "I can't deal with the huge pile of randomly selected code sections in this matter." The court of appeal did not render a decision on the issue of erroneous instructions and misstates facts as to the California Safety Order instructions requested. The trial court denied plaintiffs' Motion for reconsideration of Jury Instructions filed on January 2, 1991.

The "Concurring Causes" issue was brought to the trial court's attention the night of December 27, 1990, during selection of jury instructions and again on the morning of the 28th, the 8th day of trial. The issue was brought to the attention of the court of appeal in AOB 2-33; ARB 11-13,35.

On December 28, 1990, the trial judge drafted special verdicts, requesting de-

fense counsel's office prepare them. Judge Chapman presented the approved special verdict forms to the jury, in the jury room. These special verdict forms contained a finding as to each cause of action and enforceability of defendants' exculpatory clause in their contract, TT1593.

Between December 28, 1990 and December 31, 1990 these original special verdict forms were removed from the locked evidence room and switched to a general verdict form for one finding, compensatory damage. The general verdict forms plaintiffs found in the file on December 31, 1990 did not contain the question as to enforceability of defendants exculpatory clause or findings on each cause of action of the complaint. The trial judge did not rule, as a matter of law on the legal issue, and determined the question of enforceability of the exculpatory clause

would be a jury issue. The switching of the special verdict forms to general verdict forms, altered public records, tampered with the jury and unlawfully interfered with proceedings of the court.

This crime, which occurred between 5:15 p.m., Friday, December 28, 1990 and 1:00 p.m., Monday, December 31, 1990 confirmed the cumulative indiscretions and discrimination committed against plaintiffs because defendants are a local public entity. This brings forth the question: "Have the courts and attorneys conspired to defraud throughout litigation and trial, to deprive petitioners of due process and equal protection under the law?" Penal Code 182,184 App 199-201a.

Plaintiffs first notified the court on December 31, 1990 by phoning Warren C. Conklin, presiding judge of the superior court, of the unlawful interference and switching of verdict forms, out of court

and off the record. He was to sit for the trial judge, to hear, and take the jury verdict on January 2, 1991. Plaintiffs were advised to appear in his chambers, "to try to get it worked out" before the jury commenced deliberation at 9:00 a.m. on January 2, 1991. Petitioners filed objection to the switched verdict forms on January 2, 1991 App.126a. The court, having been notified of the unlawful interference of proceedings of the court failed to investigate, report the crime or sanction those involved in the contempt.

Plaintiffs did not approve the general verdicts found in the court file on December 31, 1990. These forms contained 12 pages, 6 of which are cover pages and bear the name of the law firm Sinsheimer, Schiebelhut & Baggett, and Steven J. Adamski and Robert K. Schiebelhut, attorneys for all defendants, App.134a-139a. Therefore it is evident that the

defendants, their attorneys, or someone from defendants law firm had access to the locked evidence room at the Veteran's Memorial Building. The fact the law firm's cover pages were on the General Verdict forms indicates that they, and someone who had jurisdiction and the authority, opened the courtroom and evidence room and allowed the jury verdict forms to be switched, constitutes an act of conspiracy. Penal Code 182,184.

The trial transcript reveals that prior to the 9:00 a.m. in-chambers conference on January 2, 1991, Judge Conklin, out of court and off the record, had improper exparte communication with defense counsel and instructed him to prepare, "General Verdict forms as to each count", TT1599. Attorney Adamski presented these General Verdict forms, with Special Interrogatories at 9:20 a.m. The Minute Order of January 2, 1991 reflects that

"counsel for defendants hands the court General Verdict forms prepared this date." and entered at 11:13 a.m., App.44a. This is incorrect. As the transcript reveals, the in-chambers conference commenced at 9:15 a.m., TT1598. Defendants' General Verdicts are noted and transcribed on the second page after the conference started, TT1599, insufficient time to draft them after the conference started. These general verdicts were refused by Judge Chapman and entered into the court file.

A telephone conference was held at 9:30 a.m. with the trial judge, R. Donald Chapman, in San Jose, California. Judge Conklin was presiding in his chambers in San Luis Obispo, California.

Plaintiffs, having discovered the verdict forms had been switched, prepared and submitted, on January 2, 1991, "Proposed Special Findings Re: Negligence, Premises Liability, Breach of Contract and

Public Interest," App.147a. Judge Chapman rejected plaintiffs' special findings and instructed the parties to meet and confer to work up Special Verdicts and return to chambers at 1:30 p.m.

Defense counsel refused to work with plaintiffs so two separate sets of Special Verdicts were presented to the court at the 1:30 p.m. conference. Judge Chapman refused plaintiffs "Revised Proposed Special Findings", App.151a, and accepted Defense counsel's set.

On December 28, 1990, the trial court presented the original special verdict forms to the jury, in the jury room at 4:45 p.m., in the temporary courtroom in the Veteran's Memorial Building; a second set, for one finding, compensatory damage, was presented to the jury at the main courthouse in Judge Conklin's jury room, at 9:00 a.m. on January 2, 1991; and thereafter at 2:30 p.m. the court asked

the jury to surrender the second set, TT1629, and gave the jury a final set of "Special Verdicts" at 2:40 p.m. on January 2, 1991, App.46a. The jury had three different sets of verdict forms in their possession at various times. These changes were prejudicial and irritated and confused the jury.

The switching of jury verdict forms was not a simple error. The court kept the jury waiting from 9:00 a.m. until 2:40 p.m. in their efforts to erase the crime that had been committed. Even though the court, the trial judge, and the attorneys, as officers of the court had been advised of this crime against public justice, no investigation or disciplinary action has taken place.

On December 28, 1990, the trial judge charged the jury with defendants' requested jury instruction, "Exculpatory Clause in Contract As a Defense," App.211a, and

refused petitioners' requested, "Exculpatory Clause in Contract Not a Defense" App.118a.

On or about May 1, 1991, the court reporter requested petitioners come to the Veteran's Memorial Building to assist her with some of the sailboat terms, with which she was having difficulty. When we arrived she was unable to get into the locked evidence room which contained her original notes from the trial, because the lock had been changed and all the keys had been called in and no one had a key to the new lock except the trial court clerk.

The matter of switched verdict forms was brought to the attention of the court of appeal on October 11, 1991 in AOB 33-35 and January 10, 1992 in ARB section 3.9, P.16.

On November 18, 1992, at oral argument, appellants brought the matter of switched verdict forms to the Honorable

Steven Stone, Presiding Justice, Arthur Gilbert and Kenneth Yeagan, Associate Justices of the Court of Appeal, citing California Government Code 6200 and 6201, App.196a, dealing with stealing, destruction, wilfully altering or falsifying public records and further brought to the court's attention Penal Code Title 7, Chapter 4, Subdivision 115, Forging, Stealing, Mutilating, and Falsifying Judicial and Public Records and Documents, and Penal Code 182,184, App 197a-201a.

The crime against public justice was explained in detail to the appellate court with copies to the California Supreme Court in Appellants' Petition for Rehearing, Point I, filed December 23, 1992.

The misconduct of the lower courts and attorneys in their failure to report to the proper authorities the altering of public records, was again brought to the

attention of the California Supreme Court in Petitioners' "Petition for Review", Point I filed January 18, 1993.

The trial court refused to call defendant Port San Luis Harbor District, or its designated agent, to the stand even though plaintiffs had served a subpoena on the District to appear at trial and produce documents. The defendants were united in interest and did not give separate answers to the complaint. This case was filed before the California Fair Responsibility Act of June 4, 1986 (Prop.51) was enacted and liability of defendants is joint and several, App.___. The court of appeal refused to address these issues in their opinion.

Both lower courts denied plaintiffs' expert witness fees and refused to address plaintiffs' California Code of Civil Procedure section 998 compromise offer of $83,999 which defendants rejected and

thereafter defendants failed to receive a better judgment, App.48a. Both lower courts misapply California Code of Civil Procedure section 998(d), App.192a. This was first brought to the attention of the lower court on January 4, 1991 in Plaintiffs Memorandum of Costs and at post trial hearings on March 12, 1991, then to the Court of Appeal in AOB 20-21.

At post trial hearings on March 12, 1991, the trial judge did not correct the inconsistent verdict, which was brought to the lower court's attention in Plaintiffs' Motion for Judgment Notwithstanding the Verdict, filed February 19, 1991, and to the attention of the Court of Appeal in AOB 16-18.

The trial court read to the jury instructions on criteria for a jury finding of enforceability of the exculpatory clause of defendants' contract. Thereafter the trial court made a definitive

ruling that the clause was not valid and was against the policy of the law. Having rendered the decision, as a matter of law, the trial judge did not inform the jury of its decision nor did it withdraw the question of enforceability from the verdict forms. The court of appeal did not address these facts, upheld the lower court ruling that the exculpatory clause is invalid but refused to publish the opinion affecting a public entity, App.42a.

After the jury rendered a verdict as to breach of contract and enforceability of the exculpatory clause of the contract on January 2, 1991, then on March 12, 1991 the lower court ruled this a tort action and not contract action at post trial motion hearings, AA5127, 5135.

The trial court's ruling on the exculpatory clause was untimely. Plaintiffs' request for a timely ruling on December 3, 1990, in their In Limine

Motion, App.95a, was brought to the attention of the Court of Appeal in ARB 36-42, AA3466.

Defendants refused to launch plaintiffs' vessel/home thereby detaining plaintiffs from October 11, 1985 through March 22, 1986, AA 3086. The special verdict form presented to the jury did not contain a question for a finding of loss of use, detention, of plaintiffs' property or diminution in value. This issue was brought to the lower court's attention during the trial, and in plaintiffs' Objection filed on January 2, 1991, App.209a, and to the court of appeal's attention AOB 9-10. The lower court determined plaintiffs' claim of emotional distress was loss of use but nevertheless restricted loss of use to time of repair.

The trial court having instructed the jury on diminution, modified Baji 14.20, it failed to include a question to the

jury for diminution in value in the verdict forms. The issue of diminution was brought to the lower court's attention in plaintiffs' Trial Brief on December 3, 1990 and to the court of appeal's attention, AOB 12.

The trial court sanctioned plaintiffs excessively on May 30, 1989 because plaintiffs opposed a 6th inspection of their vessel/home four years after the accident, when no further damage was claimed.

REASON FOR GRANTING WRIT

The Court of Appeal Opinion, App.1a, which petitioners seek to have reviewed, is dated December 9, 1992 and became final April 5, 1993.

LOWER COURT'S WAFFLING IN DECISIONS OF LEGAL ISSUES

This case concerns the right of a citizen to a fair and impartial proceeding through the courts. Reasons for granting this writ is to correct the various injus-

tices perpetrated against petitioners, not the least of which is the court denying petitioners proper representation. Granting motion to withdraw to petitioners' counsel 70 days before trial was prejudicial and deprived petitioners of a constitutional right and forced petitioners, on such short notice, to represent themselves at trial. Turner v. State of La. La 1965, 85 S.Ct. 546, 379 U.S. 466, 13 L.Ed.2d 424.

"Reviewing a case in which Federal Constitutional Rights were denied, the United State Supreme Court must inquire not merely whether those rights have been denied in express terms but also whether they have been denied in substance and effect, and must review independently both legal issues and those factual matters with which they are commingled. "Oyama v. State of California, Cal. (1984) 68 S.Ct. 209, 332 U.S. 633, 92 L.Ed. 249.

The Federal issue was presented to the Court of appeal in Appellants' Petition for Rehearing, filed December 23, 1992, and denied January 5, 1993 and to the California Supreme Court in Petition for Review, filed January 18, 1993 and denied May 31, 1993. Appellants presented to the Supreme Court the unjustified omission, in the Appellate Opinion, of the appellate court's failure to render a decision on issues presented, denying petitioners a constitutional right, therefore reviewable in the United State Supreme Court by certiorari. Nashville, C.&s. L.R. Co. v. Wallace (1933) 288 U.S. 249, 77 L.Ed. 730, 53 S.Ct. 345, 87 ALR 1191.

"No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefore be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows

expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented. "Super Tire Engr. Co. v. McCorkle, 550 Fed.2d 903, (1977) citing New York ex rel, Bryant v. Zimmerman, 278 U.S. 63, 67, 73 L.Ed. 184 (1928), quoted in C. Wright Federal Courts Section 107, at 541, (3rd Ed. 1976).

Here, the concept of judicial accountability required the court of appeal give full consideration to all the issues. The record clearly shows appellants' Petition for Rehearing, draws in question the constitutional issue of the court's failure to perform their judicial duty.

Omissions of decision of law can only be interpreted as a constitutional issue depriving petitioners of due process and equal protection of the law pursuant to Article I and VI, Section 13, (formerly 4½) of the Constitution of the State of

California, as to violate the Fourteenth Amendment to the Constitution of the United States.

If the act complained of is error, then this court has jurisdiction to review plain error, unchallenged in the state courts, when necessary to prevent fundamental unfairness. Wood v. Georgia, 450 U.S. 261, 265,67 L.Ed. 220, 101 S.Ct. 1079 (1981). See also Vachon v. Hampshire, 414 U.S. 478, 38 L.Ed.2d 666, 94 S.Ct. 664 (1974).

Here, the Federal issue, though raised, was not decided by either the Court of Appeal or the California Supreme Court. In Super Tire, supra p.907, the court held, "...more elementally, the basic jurisprudential fact that not to decide is to decide." Federal rights "are denied as well by refusal of the state court to decide the question as by an erroneous decision of it." Lawrence v.

State Tax Commission, 286 U.S. 276, 282, 52 S.Ct. 556, 558, 76 L.Ed. 1102 (1932).

As the California Supreme Court held in McClatchy v. Superior Court (1897) 119 C 413, 420, 51 P 696, discussing Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215, quoting Windsor v. McVeigh, 93 U.S. 277, 278, "....It would be like saying to a party, "appear and you shall be heard", and when he has appeared, saying your appearance shall not be recognized, and you shall not be heard." Here, as in Windsor, supra p. 278, the court in effect did this, with the result petitioners had no hearing at all on the issue.

Here, the appellate court departed from those recognized and established requirements of law, and failed to render a decision on issues presented. This was more than prejudicial error,it was a transgression of a fundamental right guaranteed to every citizen, the guarantee of

procedural fairness under the due process and equal protection clause of the Fourteenth Amendment. The court held in Postal Teleg. Cable Co. v. Adams, 155 U.S. 689, 698, "any departure from the recognized and established requirement of law, however close to apparent adherence to mere form in method and procedure, which has the effect to deprive one of a constitutional right, is as much an excess of jurisdiction as where their exists an inceptive lack of power." The California Supreme Court has held, an act in excess of jurisdiction is reviewable on certiorari, McClatchy, supra p. 421.

The Court of Appeal's omission of petitioners' arguments and refusal to render a decision on the issues of court and counsel's judicial misconduct and erroneous jury instructions on causation are acts in excess of its jurisdiction, and thereafter proceeded to judgment, with

the effect of denying petitioners due process. Actions of the lower courts should be set aside as a proper decision on the issues would mandate reversal of the trial court's judgment of denial of petitioners' motion for new trial, Aa 4603-06, 4957-5036, and judgment notwithstanding the verdict, Aa 4607-31. Country Club Tower Corp. v. Tower Management Corp. D.C. Mont. 1967, 275 F Supp 468. See Armstrong v. Manzo et ux 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965); Brenkerhoff-Faris Trust and Savings Co. v. Hill 281 U.S. 673, 505 S.Ct. 451, 74 L.Ed 1107 (1930).

The appellate court in its decision, not to render a decision, Lawrence supra, p.282, has given effect to the fact the court of appeal misconceived the meaning of the California Supreme Court decision in Mitchell v. Gonzales 54 Cal3d 1041, 1CR2d 913, (Dec. 1991), cited in petitioners' briefs and controlling in this

case, where erroneous causation instructions requires reversal of the judgment. Where the lower courts misconceived the meaning of a Supreme Court decision, is grounds for granting certiorari. Wilkerson v. U.S. Ga. 1961, 81 S.Ct. 567, 265 U.S. 399, 5 L.Ed.2d 633.

Here, the appellate court deviated from established doctrine of stare decisis where case law is directly on point. This doctrine requires that precedent be followed. Stare decisis is a judicial policy requiring the lower courts to follow established precedent and a jurisdictional limit in the power of the lower courts. Under California law a decision rendered in violation of it is void, Auto Equity Sales v. Superior Court, (1962) 57 c.2d 450, 455, 20 CR 321, 323, 20 Am.Jur.2d 183-184; Cal. Civil Appellate Practice 2ed. 1985, 4:42, 4:43. United States v. Union P.R. (1879) 97 U.S. 569, 25 L.Ed.

143. Therefore refusing to render a decision on the issue presented in appellants' pleadings prima facie conflicts with the decision of the Supreme Court on the same point of law.

Under Federal procedures federal courts are bound to follow decisions of the highest court of the state, Huddleston v. Dwyer (1944) 322 U.S. 232, 88 L.Ed. 1246, 64 S.Ct. 1015. Therefore the ruling in Mitchell is controlling. By any standard of review petitioners were denied a statutory right under article VI, Section 13 of the California Constitution as to violate the due process and equal protection clause of the Fourteenth Amendment.

Petitioners contend the appellate court exceeded its jurisdiction and the "harmless error" rule of Article VI, Section 13 was given no effect in an effort to evade the underlying constitutional mandate of fundamental fairness. Cooper

v. State of California 386 U.S. 58, 17 L.Ed.2d 730, 87 S.Ct. 788. See Chapman v. California (1967) 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824.

In People v. Watson, 46 Cal2d 818, 299 p2d 243, the court undertook a general discussion of the application of the state's harmless error rule. Wherein it held reversal would be required only when "it is reasonably probable a result more favorable to the appealing party would have been reached." People, pp. 835-837.

Here, the error is clearly evident and the appellate court failed to review the substantial evidence and undisputed expert testimony that clearly reveals a judgment more favorable to petitioners on premises liability and breach of contract would have been reached but for the error.

The trial judge's statement prior to jury deliberation, confirms such a result, (1) "the jury had evidence that the open

sea facility was dangerous," TT 1611; (2) "there was ample evidence for the jury to find both premises liability and individual negligence," TT 1612.

If the trial judge had appeared in court and presided on January 2, 1991, the 9th day of trial, he would have known the jury verdict for breach of contract and premises liability were inconsistent and clearly wrong and that his refusal to give petitioners' requested jury instructions, Baji 3.77, 3.78, 3.80, App.204a-206a, "Concurrent Causes", indeed resulted in a miscarriage of justice.

Here, as in Mitchell, the jury found negligence but no causation. The complaint, evidence and trial briefs disclosed allegations of multiple concurring causes of the injury. Instruction, Baji 3.76, app.207a, a cause in fact instruction, directed the jury to a single specific cause of the injury, removing from the

jury, after finding negligence, consideration of other causes of the injury and negligent conduct of those whom petitioners allege were erroneously dismissed and no longer joined as a party. In light of the facts presented at trial the jury instructions was an improper charge and plainly wrong. It did not fully and fairly state the law of the case, but confused, misdirected and limited the jury, depriving petitioners of a fair trial. Kotteakos v. United States (1946) 328 U.S. 750, 90 L.Ed. 1557, 66 S.Ct. 1239. The issue herein presented goes to jurisdiction and grounds to grant certiorari. McClatchy, supra p. 421. Harrington v. Calif. (1969) 395 U.S. 250, 23 L.Ed.2d 284.

The trial judge compounded the error when on January 2, 1991, during a conference call with the parties and Judge Conklin, in chambers, prior to jury deli-

beration, he made a definitive ruling the exculpatory clause of defendants' contract was invalid. The trial judge, as it appears in the transcript, stated: "Start out with the exculpatory clause. That's ...I ruled as a matter of law that the exculpatory clause is invalid as not being in the public interest. And then I ruled on it as a matter of law." Judge Conklin, presiding in chambers and sitting in Judge Chapman's absence, confirmed the ruling by responding, "Right". TT 1607. although the trial judge made conflicting statements, the ruling was recorded as evidenced in the January 2, 1991 Summary of Minute Order, App.44a.

Throughout 8 days of trial, the trial judge refused to rule on the exculpatory clause, as a matter of law, as requested in petitioners' Motion in Limine, Item No. 3, filed on December 3, 1990, app.95a.

Had the trial judge made the deter-

mination timely, on the first day of trial, December 3, 1990, the jury would not have been exposed to prejudicial testimony and evidence. Petitioners contend the trial judge's overt acts were biased and deprived petitioners of a fair trial.

Notwithstanding the prejudicial effect of the trial court's action or inaction after rendering its ruling, the appellate court's failure to render a decision and follow established precedent on the issue of erroneous jury instruction con-stituted such discrimination against petitioners as to violate the due process and equal protection clause of the Fourteenth Amendment and grounds for granting certiorari.

The lower courts, in their refusal to address the issue of irregularity and render a decision on unlawful interference with procedures of the court is an act in

excess of their jurisdiction, Lawrence, supra p. 282. Petitioners being forced by the court to present their own case at trial were not fully apprised of the court's judicial obligation to investigate and impose sanctions on those involved in the unlawful removal of verdict forms from the court file, U.S. v. Walasek, C.A. Pa. 1975, 527 F2d 676, USCA, Title 18, Section 1505, App.235a. Twelve pages of special verdict forms, approved by the parties, and presented to the jury, for each cause of action contained in petitioners' complaint, TT 1593, and a finding, by the jury on the legal issue of enforceability of the exculpatory clause of defendants' contract, were removed from the evidence room and replaced with a general verdict form with a single finding, compensatory damage, app.134a-139a. This constituted an act of conspiracy to defraud and deny petitioners due administration of justice

and a fair trial. U.S. Solow, D.C. N.Y. (1956), 138 F Supp 812, USCA Title 18, Section 1503, App.234a.

Such irregularity is a crime depriving plaintiffs of due process and a fair trial and is a crime against public justice. The act altered public records, tampered with the jury, and unlawfully interfered in court proceedings, constitutes such discrimination as to violate due process and equal protection clause of the Fourteenth Amendment.

The courts of the State of California deprived petitioners equal protection under the law when, after the crime of switching the verdict forms the court failed to investigate and allowed the crime to go unpunished. If citizens cannot rely on the courts to do their judicial duty and fulfill their obligations to the public it becomes of concern to a sufficient number of people to warrant review

by the United States Supreme Court.

The trial court presented the original special verdict forms to the jury, in the jury room of the temporary courtroom in the Veteran's Memorial Building at 4:45 p.m. on December 28, 1990, TT 1593; a second set, for one finding, compensatory damage, was presented to the jury at the main courthouse in Judge Conklin's jury room, at 9:00 a.m. January 2, 1991. These general verdict forms for compensatory damage, App.134a-139a, were in the jury's possession for 5½ hours when the court asked the jury to surrender them at 2:30 p.m., app.45a. The jury was given the fourth and final set, Special Verdict Forms at 2:40 p.m. on January 2, 1991. The third set, "General Verdict with Special Interrogatories," drafted by defense counsel, at Judge Conklin's direction was filed in the record, app.140a.

The effect of the initial unlawful act, caused multiple, different and misleading jury verdict forms to be presented to and withdrawn from the jury. This irregularity caused irritation and confusion and misdirected the jury.

In the face of this misdirection and the circumstances of the case it cannot be assumed this was a harmless error, but a transgression of a constitutional right of procedural fairness as to violate due process and equal protection clause of the Fourteenth Amendment, making applicable Article VI, Section 13, of the California Constitution. The issue here goes to jurisdiction and grounds for granting writ of certiorari, McClatchy, supra 421. Review of the United States Supreme Court is required to prevent fundamental unfairness, Woods, supra 265.

LOWER COURT'S FAIL TO APPLY PRECEDENT

The Law and Motion department of the

Superior Court granted defendants' motion barring petitioners' a trial on the merits as to their emotional distress claims alleged in their complaint. The court ruled petitioners' emotional distress claim, "Are barred by the Tort Claims Act," App.51a.

The shield against lawsuits provided for the government by the California Tort Claims Act expressly excludes actions arising under contract, California Government Code Section 814. Longshore v. Ventura County (1979) 25 C3d 14, 157 Cr 706. Here the court misconceived the meaning of Section 814, App.185a. The legislative committee comments read in part: "The doctrine of sovereign immunity has not protected public entities in California from liability arising out of contract. This section makes clear that this statute has no effect on the contractural liabilities of public entities and

public employees." Therefore the complaint and cross-complaint for breach of contract makes inapplicable the "Tort Claims Act" as a bar to a cause of action for emotional distress. The issue before the court was defendants' claim that petitioners had failed to file a claim for emotional distress. The court erred in its decision and failure to follow established precedent constitutes an act in excess of its jurisdiction therefore void.

The appellate opinion's misstatement of law and fact is also error, an act in excess of their jurisdiction. The California doctrine of stare decisis requires a precedent be followed. A decision rendered in violation of it is void, Auto Equity, supra, p. 455.

Here, both lower courts failed to follow established precedent and misconceived the meaning of the California

Supreme Court decision in Wilson v. San Francisco Redevelopment Agency, 19 C3d 555, 138 CR 377. The precedent established in Wilson is clear and the San Luis Obispo County Superior Court subsequently upheld the grounds in Wilson as established precedent. In Cavalier Acres, Inc. v. San Simeon Acres Community Services District, 151 CA3d 798, 199 CR 4 (June 1984), this court held "Although the claim may have been defective here, Wilson teaches us that a public agency's failure to comply with Government Code Section 53051 entitles claimant to ignore the claim filing requirements entirely."

A review of the record reveals defendant District was not in compliance with registration requirements of the Roster of Public Agencies, pursuant to California statute, Government Code 53051, App.162a, and fully admitted in their pleadings that a Statement of Fact was not

filed with the County Clerk in 1985 and the 1984 statement on file was so inaccurate as not to be in substantial compliance.

To deny petitioners a trial on the merits of their emotional distress claims, based on the misstatement of fact and failure to follow precedent, is a miscarriage of justice and constitutes such discrimination as to violate due process and equal protection clause of the Fourteenth Amendment.

In the instant, petitioners contend the appellate court misconceived the meaning of the Supreme Court decision in Wilson and a writ should issue as the decision in Wilson is controlling in petitioners' case, and subject to review by this court, Wilkerson, supra p. 636.

LOWER COURT'S FAILED TO UPHOLD STATE STATUTES AND PROTECT CONSTITUTIONAL GUARANTEES

The judgment entered by the trial judge made the determination that petitioners are the prevailing party in the action, App.49a.

FAILED TO UPHOLD STATE STATUTES DENIES CONSTITUTIONAL RIGHT

The judgment entered by the trial judge made the determination that petitioners are the prevailing party in the action, App.49a, TT 5127.

Under California law, the only requirement to bring California Civil Code 1717, app.159a into operation is that one of the parties becomes the prevailing party in the action. Beneficial Standard Properties v. Scharps (1977) 67 CA3d 227, 232, 136 CR 549.

Subsequently, the trial court denied the statutory right of recovery of attorney's fees and other costs pursuant to the contractural agreement. Bussey v.

Affleck (1990) 225 CA3d 1162, 1165, 1167, 275 CR 646, Code 1717 necessarily assumes, as here, a contractural agreement pursuant to California Civil Code 1021, App.195a, and makes reciprocal the award of attorney's fees and costs of a unilateral contract agreement, an allowable cost under California Code of Civil Procedure 1032, App.163a, authorized by Section 1033.5(10)(A)(a) and (10)(B)(a), App.165a.

The trial court committed material prejudicial error and the appellate court failed to exercise its discretion in denial of statutory right of election of remedies doctrina. Both lower courts misinterpreted newly amended staatutes and erroneously upheld the trial judges construction of the law. Hernandez v. Garwood (1980) Fla. 390 So.2d 357. The trial judge stated, "There is no statute that allows for attorney fees in tort action. The fact duty arise, (sic) in

contract doesn't give either party the right to claim their attorney fees in this matter," TT 5134-35. The lower court's decisions are inconsistent with determinations to the contrary. Witkin, the leading text writer on California law has succinctly assessed to the contrary. See 3 Witkin Cal Procedure 3rd (1985), Actions, Section 122, App.176a. Here, the negligent violation of the contract does not make this a tort action. Allegations in the complaint and cross-complaint make the "gravaman" of the action, damages for breach of contract. 3 Witkin 3rd Ed. (1985) Actions, Section 119, App.167a, and 1992 Supp App.174a. See also 7 Witkin Cal Pro, 3rd 91985) Judgments, Section 152, 153, App.180a.

Failure of the courts to adhere to established law and statutes invalidate such statutes and constitutes such discrimination against petitioners as to

violate the due process and equal protection clause of the Fourteenth Amendment. Atlantic Coast Line R. v. Phillips, Gs. 1947, 67 S.Ct. 1584, 332 U.S. 168, 92 L.Ed. 1977, 173 ALR 1.

The lower court's misinterpretation of applicable state statutes and failure to exercise its authority is an act in excess of its jurisdiction denying petitioners' rights guaranteed by the constitution and is grounds for granting writ of certiorari for review by the U.S. Supreme Court. Louisiana R. etc. Co. v. New Orleans, La. 1914, 35 S.Ct. 62, 235 U.S. 164, 59 L.Ed. 175.

The lower court's misinterpretation and failure to uphold state statutes denied petitioners' rights guaranteed by the Constitution and is grounds for granting a certiorari by review by the United States Supreme Court. Louisiana R. etc. Co. v. New Orleans, La 1914, 35 S.Ct.

62, 235 U.S. 154, 59 L.Ed. 175.

The appellate opinion misstates the facts and misinterprets the issues presented, App.12a. It is not required the jury sift through various codes as listed on plaintiffs' requested jury instruction Baji 3.45, TT 1610. It is the judicial obligation of the trial judge to discuss jury instructions with the parties in order to prevent an injustice. Here, at the direction of the trial judge at the out of court jury instruction selection, petitioners were directed by the trial judge to list and supply copies of all codes and statutes relevant to the case. Having done so, the trial judge refused to allow argument, discussion or selection of specific Safety Orders and Statutes that were applicable. The trial judge failed in the performance of his judicial duty to prevent an injustice due to petitioners

inadvertance. Taylor v. Bell 21 CA3d 1002, 98 CR 855.

The appellate opinion also erred in the interpretation of evidence presented at trial as it relates to Baji instructions 11.53, App.208a. All statutes, safety orders and evidence presented at trial concerned the Mobile Boat Hoist Facility specifically. The court refusal to give petitioners' proffered instruction 11.53 identifying that facility was error. In light of other numerous instructions relating to dangerous condition of public property proffered by defendants and accepted by the court, the identity of the specific facility alleged to be a dangerous condition of public property was proper. Therefore, refusal of petitioners' jury instructions denied petitioner a constitutional right of jury consideration of a specific nature, and constitutes such discrimination against petitioners as to

violate due process and equal protection clause of the Fourteenth Amendment. Naupe v. People of State of ILL., ILL 1959, 79 S.Ct. 1173, 360 U.S. 264, 3 L.Ed.2d 1217.

Here, petitioners, in propria persona, were not only denied due process, the constitutional right of a hearing on the Bailment cause of action allaged in the complaint Oyama, supra p. 254, but were denied equal protection of the law when the trial judge committed wilful and prejudicial misconduct in the performance of his judicial duty in failing to prevent a miscarriage of justice. The action of the trial judge reflects favoritism and partiality toward Defendant District, a public entity, making applicable Article VI, Section 13 of the California Constitution, App.191a.

Although the trial judge is not required to act as counsel for lay persons representing themselves, it is his duty to

see that a miscarriage of justice does not occur through inadvertance. Taylor v. Bell (1971) 21 CA3d 1002, 1008, 98 CR 855, 859.

The actions of the trial judge was instrumental in denying petitioners a ruling on the bailment cause of action. The trial judge informed petitioners, in chambers:

> "You will lose your negligence cause of action if you don't drop common carrier".

By design, this statement coerced petitioners to unintentionally withdraw common carrier, count 2, of the Bailment cause of action. AA8.

The trial judge's statement, without further explanation failed to fully inform petitioners his true meaning, bhat "strict liability" would issue under the bailee/bailor relationship of the bailment contract. Petitioners, as a result of the judge's statement unintentionally withdrew common carrier. Wuest v Wuest (1942) 53

CA2d 339, 127 P2d 934.

At the in-chambers conference on December 3, 1990 the trial judge heard defense counsel contradict defendants answer to the complaint when he admitted that Defendant District is a common carrier. Defendants reversed their position and made clear their intent to claim common carrier status. App.215a-232a. The trial judge, with knowledge of the common carrier status, by inference encouraged and thus caused petitioners to unintentionally withdraw Count 2, Common Carrier of the Bailment cause of action. Such action was to deny petitioners an important, substantive, and procedural right. Here, the trial judge committed prejudicial misconduct in departing from his judicial duty and failed to prevent a miscarriage of justice. Judicial misconduct was so prejudicial objection is not required. Etzel v. Rosenbloom (1948 83

CA2d 758, 189 P2d 848.

On December 27, 1990, petitioners brought to the trial judge's attention Defendant District's admission of common carrier status upon filing, "Proposed Jury Instructions Requested by Plaintiffs: (1) Exculpatory Clause/Assumption of Risk; (2) Strict Liability, App.114a. These instructions were refused.

The trial judge, in direct conflict with a judicial duty, failed to avert a miscarriage of justice and failed to see that the jury was fully and fairly instructed on common carrier, on the issue of bailment and see that the issue was presented to the jury.

The repeated waffling of the judge and indecision to rule as a matter of law on the legal issue of enforceability of the exculpatory clause of defendats' contract was highly prejudicial. Here the jury was to hear reference to the clause,

other testimony, and instruction as a defense when in the end the court sustained petitioners position that the clause as a defense is unavailable and the fact and operation of the clause inadmissable, TT 1607.

This issue would have been averted had the trial judge made a timely ruling in response to petitioner's In Limine motion on December 3, 1990, App.95a. Had the ruling been timely a judgment more favorable to petitioners would have resulted, and the trial judge would not have felt compelled to coerce plaintiffs into dropping common carrier and bailment cause of action would have gone to the jury. It was misconduct for the trial judge to usurp the fact finding function of the jury. Langdon v. Superior Court (1923) 65 CA 41, 223 P 72. By the actions of the trial judge petitioners were denied a hearing on the bailment cause of action of

the complaint and on petitioners' theory of defendants strict liability as a common carrier. This was not just harmless error and made applicable Article VI, Section 13 of the California Constitution.

The appellate court misinterpreted the facts as they appear in the record and gave no effect to the trial judge's failure in his judicial duty that denied petitioners a constitutional right as to violate due process and equal protection clause of the Fourteenth Amendment.

JURY NOT FULLY INSTRUCTED ON THEORY OF LIABILITY

It was established at trial petitioners vessel was damaged and could not be restored to its original condition. It was further established that the vessel was detained in defendants' boatyard between October 11, 1985 and March 22, 1986 by defendants' refusal to launch the vessel. During the period of detention the vessel was unable to be used for its in-

tended purpose. Here, the trial judge refused petitioners modified jury instruction, Baji 14.22 for reasonable value of the loss of use of plaintiffs' personal property during the period of detention, App.209a, and gave instead instruction Baji 14.22 as written, for only time reasonable and necessary for repairing the damage. The jury was also instructed as to diminution, Baji 14.20, page 2 only.

On December 28, 1990, neither party had prepared jury verdict forms. The trial judge drafted and had defense counsel prepare special verdict forms of the issues to be presented to the jury. Here, the trial judge erred and failed to check for completeness and adequacy of jury instructions. This may be particularly appropriate if one of the parties is appearing in propria persona. Taylor, supra p. 1008.

The trial judge instructed the jury

as to breach of contract measure of damage, TT 1584-86. Although the jury was instructed as to loss of use and diminution the special verdicts failed to differentiate or present to the jury for consideration damages other than breach of contract damages. Without specific questions for jury determination as to loss of use and diminution in the special verdict forms, limited the jury consideration to property damage alone. Here, the error of the trial judge denied petitioners a fair trial and the guarantee of procedural fairness as to be violative of due process and equal protection clause of the Fourteenth Amendment.

The trial court, in dismissing all defendants except the District and Jack Rodin, Jr., denied petitioners due process, equal protection and procedural fairness guaranteed under the Fourteenth Amendment. The application of the Fair

Responsibility Act of June 4, 1986, (Proposition 51), abolished the principle of joint and several tort liability in California. In Russell v Superior Court, (1986 1 Distr.) 185 CA3d 810, 230 CR 102. In this case the court ruled California Civil Code 1431.2(a) is not retroactive, and may be applied only to causes of action which occurred on or after its effective date of June 4, 1986. Therefore in the present action, liability of defendants is joint and several. On May 31, 1988, petitioners filed Motion for Determination of Undisputed Issue Declaring the Fair Responsibility Act of 1986 is Not Retroactive and is Not Applicable in This Case, Aa 417. The court failed to make a ruling, instead had the attorneys of record, in open court, stipulate that California Civil Code Section 1431.2 was not applicable and liability would be joint and several. The

court failed to rule on the motion as a matter of law.

On April 17, 1986, petitioners filed suit against multiple defendants on the theory of joint and several liability. It is settled in California that tort action, when two or more persons have been concerned in the commission of the tort, the injured party may proceed either jointly or severally aginst such tort feasors who are jointly and severally liable and where, as here, the complaint alleged only joint negligence on the part of the joint tort feasors it nevertheless states a complete individual liability against each party so sued on account of the single act which the complaint presented. Shea v. City of San Bernardino, 7 Cal2d 688, 693-94, 62 P2d 367 (1963).

Where as here, petitioner sues a negligent agent or employee, joining his master, principle or employer as a defen-

dant on the theory of respondeat superior a separate count can be alleged against each. Defendants sued upon a theory of joint and several liability, each is potentially liable for the full amount of any judgment.

The trial judge was informed of joint and several liability, App.108a, and petitioners offered instructions on the issue, TT 1552. Here, the trial judge determined Proposition 51 as inapplicable and thereafter refused to give petitioners' proffered instructions or draft on his own motion, an applicable instruction.

The trial judge, in refusing to instruct the jury on joint and several liability worked a modification of liability and diminished the total available damages. The actions of the trial judge was prejudicial and his failure to see that the jury was fully instructed was misconduct. Taylor, supra p. 1008, California

Code of Civil Procedure 607(a). The trial judge failed to prevent a miscarriage of justice in his refusal to instruct the jury on joint and several liability as petitioners had requested deprived petitioners of substantial rights and diminished individual defendants total liability to make applicable Article VI, Section 13, of the California Constitution.

Further, the court in Russell did not determine the constitutionality of Proposition 51 or interpret its substantive provision. Petitioners here allege the Fair Responsibility Act of 1986 is unconstitutional as the court applied it in this case, therefore 28 USC 2403(b) may be applicable. Under California law, a plaintiff clearly has a right to sue a negligent servant, agent, or employee, joining his master, the principle, or employer as a defendant on the theory of

respondeat superior and maintain a separate account appropriately alleged such whether in tort or in contract, People v. Edwards 9 Cal. 286 (1958).

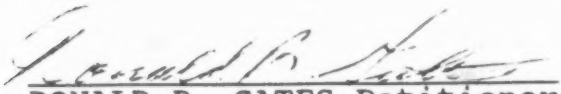
Here, the trial judge committed prejudicial misconduct in refusing to properly instruct the jury on liability and applied and give effect to an inappropriate California statute petitioners herein allege is unconstitutional as to violate due process and equal protection clause of the Fourteenth Amendment.

CONCLUSION

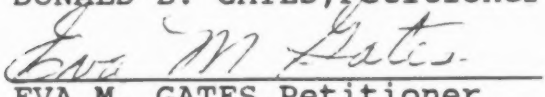
The foregoing reasons, if action or inaction of the lower courts infringe upon the constitutional rights of a single citizen it reflects upon the conerns of all citizens. Petitioners respectfully pray that their petition for writ of certiorari be granted. In the event that the Petition is granted, petitioners pray that the judgment of the Court below be rever-

sed, that the cause be remanded, and that the court below be directed to grant a new trial on the issues presented on appeal.

Respectfully submitted,



DONALD B. GATES, Petitioner



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DATED: July 12, 1993

93-101

Supreme Court, U.S.
FILED
JUN 25 1993
OFFICE OF THE CLERK

CASE NO. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1993

DONALD B. GATES, and
EVA M. GATES PETITIONERS

v.

PORT SAN LUIS HARBOR DISTRICT; JACK RODIN, JR.; MARLIN STEBBINS; NORMAN COY, JR.; MATT COLLAR; BILL BARROW; WILLIAM KING; STEWART JENKINS; GERARD PARSONS; JIM CHAMBERS; JIM BLECHA; and DENNIS JOHANSEN

RESPONDENTS

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI

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Petitioners Appearing in Propria Persona

2418

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OPINION FILED DECEMBER 9, 1992

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SIX

2d Civil No. B057338

DONALD B. GATES, et al., PLAINTIFFS,
CROSS-DEFENDANTS
and APPELLANTS

v.

PORT SAN LUIS HARBOR DISTRICT, DEFENDANT
CROSS-COMPLAINANT
and APPELLANT

JACK RODIN, JR., et al., DEFENDANTS
and APPELLANTS

Donald and Eva Gates(Gates) brought their vessel to Port San Luis Harbor District (Port) for routine maintenance.[1] During the haul out, Port damaged the boat.

Gates sued Port and numerous individuals on various theories, e.g. negligence and breach of contract.

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[1]/ We refer to Gates in the singular for reader clarity. Further references to "Gates" includes both appellants unless otherwise indicated.

Port cross-complained for payment on the contract with Donald Gates. Trial by jury ensued on negligence, premises liability and breach of contract as to Port and Jack Rodin.

On special verdicts, the jury awarded Gates $35,000 for Port's negligence and awarded Port $1,919.95 for breach of contract. The trial court awarded Gates $15,979.36 in costs; it awarded Port $513.50 for costs. It denied prejudgment interest to Gates and awarded prejudgment interest to Port. The trial court did not award attorney fees to either party. Gates, Port and Rodin appeal from portions of the judgment and from various orders issued by the trial court. Port's motion to dismiss Gates' appeal is denied. (Lee v. Brown (1976) 18 Ca.3d 110, 113, 115.)

Gates contends: 1. the damages awarded them are inadequate, 2. the negligence verdict is inconsistent with the verdict

for Port on the contract, 3. the trial court erred in denying attorney fees, certain expert witness fees, prejudgment interest and other expenses, 4. the trial court erred in rulings on various evidentiary issues, and 5. the trial court and counsel engaged in prejudicial misconduct.

Port and Rodin contend that Gates' action is barred by an exculpatory clause in the contract and that the court abused its discretion in denying attorney fees on the contract. We affirm.

DISCUSSION

Loss of Use Instruction

Gates contends he was entitled to a modified version of BAJI No. 14.22 to allow damages for fair rental value, known as detention, for approximately five years longer than the time necessary for repair because their vessel is a home. Not so.

The trial court gave the following modified standard BAJI No. 14.22 (1986

rev.): "Reasonable compensation to plaintiff for being deprived of the use of his [property] during the time reasonably necessary for repairing the damage [legally] resulting from the accident. In determining the amount you may consider the reasonable rental value of the (property) for the period of time just mentioned."

In Valencia v. Shell Oil Co. (1944) 23 Cal.2d 840,844, the California Supreme Court states that "[w]here a vehicle is damaged by the wrongful act of another, the owner is entitled to recover for the damage done to the vehicle and for the loss sustained by being deprived of its use. [Citations.] . . . [A]n owner's recovery for being deprived of the use of a damaged vehicle is generally to be determined with reference to the period of time reasonably required for the making of repairs. [Citations.]"

That the vessel was also Gates' home is not controlling. The Vehicle Code describes a vessel to include "(a) . . . every description of watercraft used or capable of being used as a means of transportation on water, except the following: . . . (3) A floating structure which is designed and built to be used as a stationary waterborne residential dwelling . . . ." (Veh. Code, § 651, subd. (n).)

Diminution in Value Instruction

Without citation to authority, Gates argues entitlement to an instruction permitting damages for both the cost of repairs and for diminution in value because the vessel cannot be restored to its original condition.

The trial court gave a modified version of an instruction requested by Gates, BAJI No. 1420 (1986 version). The instruction states: "If the damages have been repaired, or are capable of repair, so

as to restore the fair market value as it existed immediately before the accident, at a cost less than such difference in value, then the measure of damage is the cost of such repair rather than such difference in value. . . .[¶] If repairs have been made but the property cannot be completely repaired, the measure of damages is the difference in the fair market value of the property immediately before the accident and its fair market value after the repairs have been made plus the reasonable cost of making the repairs."

The instruction given properly permitted the jury to consider either cost of repair if it believed complete repairs were made or the difference in fair market value before and after the accident plus the reasonable cost of repairs if the jury believed that the vessel could not be completely repaired (Merchant Etc. Assn. v.

Kellogg E. & D. Co. (1946) 28 Cal.2d 594, 600.)

Emotional Distress Cause of Action

Gates claims that the trial court abused its discretion in granting defendants' motion for summary adjudication regarding emotional distress on three theories: 1. the trial court ruled on the summary adjudication motion during the pendency of a motion for change of venue, 2. he relied upon Port's admission that plaintiffs complied with the claims statutes, and 3. Port failed to comply with certain requirements of the Roster of Public Agencies. We reject these theories.

The pendency of a motion for change of venue under Code of Civil Procedure section 394 does not preclude the trial court from ruling on other matters. (City of Oakland v. Darbee (1952) 102 Cal.App.2d 493, 502-504.)

Port's initial answer to Gates' original complaint admitted that Gates complied with the claims statutes. The trial court, however, granted Port's motion to amend its answer to state that Gates failed to timely file a claim for personal injuries, including emotional distress. None of Gates' administrative claims sought damages for personal injuries, such as emotional distress, and the Gates' first complaint requested no such relief.

One must present a written claims specifying personal injury against a public entity, such as Port, within six months after the date of accrual of the cause of action (Gov. Code, §§ 911.2, 945.4, 950.2) "In actions for damages against local public entities, the claims statutes require timely filing of a proper claims as condition precedent to the maintenance of the action. [Citations.] Compliance with the claims statutes is mandatory

[citation]; and failure to file a claim is fatal to the cause of action. [Citation.]" (City of San Jose v. Superior Court (1974) 12 Cal. 3d 447, 454.)

"[T]he purpose of these statutes is to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation. [Citations.] It is well-settled that claims statutes must be satisfied even in face of the public entity's actual knowledge of the circumstances surrounding the claim. Such knowledge - standing alone - constitutes neither substantial compliance nor basis for estoppel. [Citations.]" (City of San Jose v. Superior Court, supra, 12 Cal.3d at p.455)

Unlike the case of Fredrichsen v. City of Lakewood (1971) 6 Cal.3d 353, Port did not engage in unconscionable conduct

prejudicially misleading Gates. (See also Driscoll v. City of Los Angeles (1967) 67 Cal.2d 297, 306-310.) Port's insurer began in good faith to negotiate a settlement with Gates before Port denied the claim.

We also reject Gates' vague argument that Port's failure to make "various amendements in the public roster" excuses him from compliance with the claims statutes.

"[F]ailure to file a claim does not bar an action against the public agency if . . . the agency has failed to file in the Roster of Public Agencies, . . . information concerning itself which substantially conforms to the requirements of [Gov. Code] section 53051. . . . [E]ach agency shall file . . . a statement containing (1) its name and address, (2) the name and address of each member of the governing board, and (3) the name, title and address of the officers. Within 10

days of any change in the foregoing data, an amended statement reflecting the changes must be filed." (Wilson v. San Francisco Redevelopment Agency (1977) 19 Cal.3d 555, 557-558.)

"[T]he failure to present a claim does not constitute a bar . . . to the maintenance of a suit . . . if . . . the information contained [in the statement or amended statement] is so inaccurate or incomplete that it does not substantially conform to the requirements of [Gov. Code] Section 53051." (Wilson v. San Francisco Redevelopment Agency, supra, 19 Cal.3d at pp. 559-560; see Gov. Code, § 946.4, subd. (a)(2).)

Port substantially complied with these requirements. Furthermore, Gates was able to file a timely, albeit incomplete, claim. Accordingly, the trial court did not err in refusing to give a jury instruction which

would permit damages for emotional distress.

Other Instructional Error Asserted

Gates also questioned the trial court's refusal to give BAJI No. 3.45 (7th ed. 1986) regarding negligence per se for violation of statutes. The court properly refused to give this instruction because it would have required the jury to sift through a "huge pile of randomly selected" safety orders, Department of Motor Vehicle and Vehicle Code statutes irrelevant to the case.

Gates also objected to the trial court's refusal to give standard BAJI instruction No. 11.53 (7th ed. 1986). They contend that giving modified BAJI No. 11.53 burdened the jury by requiring it to differentiate between district property in general and the specific hoist used. Because the evidence did not concern statutes relevant to plaintiffs proffered

instruction, the court properly refused to give it.

Evidentiary Rulings Challenged

Gates contends that the trial court erred in refusing to permit the introduction of a marine survey and certain expert witnesses' testimony.

Through in limine discussion on the morning trial commenced, the trial judge ascertained that Gates failed to disclose one of his experts, Mr. Adams. The judge denied Gates' request to permit him to testify as an expert witness because,". . . you've had ample time to disclose your experts in this matter. There would be a severe hardship to the defense to allow late disclosure. They never had a chance to depose the gentleman, a process that is considered absolutely essential . . . ." For the same reason, the court refused to allow Doug Jones to testify as an expert witness. In addition, the trial court

properly sustained objection to the introduction of a status report prepared by Doug Jones because Gates failed to provide notice that he was an expert witness.

The trial court properly denied the admission of a survey report prepared by undisclosed expert, Mr. Fredenburg, who passed away before Port had an opportunity to depose him. It is inadmissible hearsay. (Evid. Code, §§ 1200, 801, 802, 803, 804; People v. Coleman (1985) 38 Cal.3d 69, 92-93; Mosesian v. Pennwalt Corp. (1987) 191 Cal.App.3d 851, 860.)

The court properly sustained objections to the introduction of some documents because they are inadmissible hearsay. They include: a letter and a document from the Division of Occupational Health and Safety regarding certification of Port's mobile boat hoist (Exh. 52 and 53), a report on hoist facility improvements (Exh. 57), part of exhibit 58,

an Army Corps of Engineers survey and business records, a letter and surveys of Mr. Fredenberg, a survey by Captain Fosse (Exh. 91).[2]

The trial court correctly refused to permit into evidence most of a preliminary "port interior configuration and economic feasibility study" because the witness reading it was "not familiar with the entire works of that document . . . ." The witness testified; "This report I'm not familiar with, so I'm not sure which plan that was."

Because of lack of foundation, confusion of the issues and the impracticality of obtaining headphones for the jury, the trial court properly sustained objections to the entry of various tapes and transcripts thereof.

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[2]/ At oral argument, Gates tendered the deleted portion of Exhibit 58 for our consideration. Gates has not demonstrated as a matter of law that the deleted portion of Exhibit 58 was admissible.

Gates placed before the jury substantial expert witness testimony and documentary evidence. The court liberally allowed such evidence whenever Gates laid a proper foundation, especially when they offered evidence for appropriately limited purposes.

Inconsistent Verdicts

Gates asserts that the jury's verdicts that the Port was negligent and that Port did not breach the contract are fatally inconsistent. A judgment or verdict which is inherently and logically inconsistent cannot be upheld. A judgment is subject to reversal unless the apparent inconsistency can be reasonably reconciled. (Brewer v. Simpson (1960) 53 Cal. 2d 567, 584.)

Gates urges that the duty of care arose out of the contract itself. (Langley v. Pacific Gas & Electric Co. (1953) 41 Cal.2d 655, 662.) Gates argues that because Port negligently performed the

contract, he is not responsible to pay for it. Not so.

The obligation to exercise due care is broader than and is independent of contract obligations. As the Supereme Court states in Jones v. Kelly (1929) 208 Cal. 251, 255, "[t]he law imposes the obligation that 'every person is bound without contract to abstain from injuring the person or property of another . . . .' (Sec. 1708, Civ. Code.) This duty is independent of the contract and attaches over and above the terms of the contract."

"A tort may grow out of or make a part of, or be coincident with a contract." (Jones v. Kelly, supra, 208 Cal. at p. 255; see generally Gruenberg v. Aetna Ins. Co. (1973) 9 Cal.3d 566, 578; Younan v.Equifax, Inc. (1980) 111 Cal.App.3d 498, 511.)

Where, as here, the complaint states a breach of duty growing out of the contract, it is ex delicto. (Jones v. Kelly, supra,

208 Cal. at p. 254.) The complaint and proof both established that Port's negligence only "incidentally involved a breach of the contract." (Id., at pp. 254-255.) Because Gates alleged and proved that Port violated broader duties in neligence, independent of the contract, the jury's finding that Donald Gates breached the contract is not irreconcilable with the negligence verdict. As the trial court stated, the verdict for the hauling fee is merely an offset against the negligence verdict rendered by the jury.

Nonsuit to Individuals

Gates claims that the trial court erroneously granted nonsuit to individuals of the hoist crew, Norman Coy, Jr., Matt Collar and Bill Barrow. Port moved for nonsuit because Gates failed to mention the potential liability of these individuals in their opening statement.

Although the opening statement was not transcribed, the trial court explained on the record, "you [Mrs. Gates] did not state to the jury any evidence that you intended to prove that any particular individual linesman was negligent." "All intendments and presumptions are indulged to support [a judgment or order] on matters as to which the record is silent, and error must be affirmatively shown." (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 268, p. 276.)

Mrs. Gates referred to Jack Rodin, Jr., only as "the linehandler on the port stern when the chock broke." She said that he "lost his line and fell down, and that constituted negligence." The trial court ruled: "As to three of the linesmen, at least, you haven't even come close [to asserting a cause of action as to a named individual] because you haven't said anything that they did was wrong."

The court denied nonsuit as to Jack Rodin because "she has stated facts that that linesman did fall down and drop his rope causing the accident." The court liberally permitted the action to proceed as to Rodin, and properly granted nonsuit as to the other three linesmen.

Directed Verdict re: Marlin Stebbins

Gates assigns as error the directed verdict granted Marlin Stebbins, the superintendent and agent for Port.

The trial court may grant a directed verdict when "disregarding conflicting evidence, and indulging every legitimate inference which may be drawn from the evidence in favor of the party against whom the verdict is directed, it can be said that there is no evidence of sufficient substantiality to support a verdict in favor of such party . . . ." (Walters v. Bank of America Etc. Assn. (1937) 9 Cal.2d

46, 49; Dailey v. Los Angeles Unified School Dist. (1970) 2 Cal.3d 741, 745.)

Gates claims error because he established that Stebbins invited them to bring their vessel into the hoist facility even though he knew, and wilfully failed to disclose, the excessive surge, silting and shallowness of water within the facility.

The trial court properly granted the motion because Gates never alleged they were injured by misrepresentation. The complaint stated that Stebbins had "control of the vessel" and that he "negligently and carelessly allowed the vessel to fall and sway, striking the lift and adjacent supports." Because there is no evidence that Stebbins participated in the acts alleged, he may not be held liable for them.

Misconduct of Court, Counsel and Jury

Gates claims a broad variety of misconduct by the trial court and defense

counsel. We briefly consider the intelligible issues raised. (See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 479, p. 470.)

Gates assigns as error repeatedly sending this matter out for binding arbitration and continuing the setting of a trial date. Gates moved to disqualify all the judges in the San Luis Obispo County Superior Court, and now suggests, without substantiation, that the presiding judge made a determination about this case long before trial. Arbitration is a favored method of resolving disputes efficaciously, and the trial court properly used its discretion to calendar this action. We commend the trial court for its effort in attempting to persuade the parties to settle this matter before expending precious judicial resources.

Gates assigns error to the trial court for permitting their previous attorney,

Peter Goldenring, to withdraw from the case. Mr. Goldenring's declaration states, inter alia, "[w]e failed to reach agreement concerning the handling of the case and its preparation for trial. They failed and refused to execute a Substitution of Attorneys and also refused to leave my office, whereupon I was required to call the Ventura Police Department for their assistance in removing the plaintiffs from the premises." Gates concedes having "engaged a total of seven attorneys during these past five years" He opines that "[e]ach relationship ended for its own good reason." The trial court properly permitted Mr. Goldenring to withdraw from this case.

Gates complains of court and counsel blocking unspecified discovery efforts. Gates does not state how the court improperly denied his ex parte motion on a

discovery matter, and we shall not speculate on the matter.

During this action, Gates improperly stopped a deposition in progress, failed to comply with rules of court to compel discovery and failed to try to resolve discovery matters prior to their motion to compel discovery. (See Code Civil Proc., § 2025, subd. (o).) The trial court imposed sanctions because of these derelictions of duty.

Gates complains that the court granted motions for summary adjudication, summary judgment and judgment on the pleadings as to all individual defendants, except Jack Rodin, without signing orders thereon or serving plaintiffs until after trial was completed.

Gates objected at the hearing on these motions and by in limine motions, stating they did not know which individuals would remain parties to the case.

Although the trial court did not sign these orders until January 24, 1991, Gates was present and he participated in the hearing on these motions. Failure to timely sign these orders did not result in prejudice. The trial court properly granted summary judgment as to defendants King, Jenkins, Parsons, Chambers, Blecha and Johnansen on the contract cause of action because none of these individuals were parties to the contract. Port entered into the contract with Gates. The above individuals are commissioners of Port and the harbor manager. As mere agents of the contracting party, they are not liable under the contract. (See 1 Witkin, Summary of Cal. Law (8th ed. 1973) Agency and Employment § 185, pp. 780-781; Stoiber v. Honeychuck (1980) 101 Cal.App.3d 903, 929.) Other named individuals were not parties to the contract, either. Therefore, the trial court properly granted judgment on the

pleadings as to the remaining individual defendants on the contract causes of action.

The trial court also properly dismissed the negligence claims against defendants King, Jenkins, Parsons, Chambers, Blecha and Johansen because they did participate in hauling out the vessel. There were supervisors. Under Government Code section 820.8, supervisors cannot be held liable for the acts or omissions of others. (See also Van Alstyne, Cal. Government Tort Liability Practice (1992) §§ 2.56, 2.148, pp. 128, 278-280.)

The trial court also properly dismissed the individual defendants for premises liability. To prove premises liability, one must show, inter alia, that the employee had the authority and the funds available to avoid the dangerous condition. (Gove. Code, §§ 840.2, 802.8, 821; see generally Bauer v. Caounty of

Ventura (1955) 45 Cal.2d 276, 291, which concerned Gov. Code, § 1953, subd. (c), a Storm Drain Maintenance Dist.; Van Alstyne, supra, at § 3.90, pp. 417-418; Taylor v. Buff (1985) 172 Cal.App.3d 384, 388, 390.)

The trial court stated: "I think it is undisputed that the . . . defendants individually did not have the authority or the funds to correct a dangerous condition." They are also immune from liability for any injury caused by their failure, if any, to authorize funds required to fix the condition. (Gov. Code, § 821.) Summary adjudication of these issues provided the grounds for dismissal of the individual defendants.

Gates asserts that defense counsel improperly contacted juror Blakeslee, who had a prior association with defense counsel's firm, to obtain knowledge of the contents of a letter presented to the trial judge. Gates also argues that Blakeslee

had prejudged the case and that the jury was inattentive.

Gates presents no objective, admissible evidence of juror misconduct. He refers only to the jury foreman's statement that he thought that Blakeslee had prejudged the case. This subjective evidence of theoretical jury misconduct is not admissible. (Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 411, 413.) Nor may we consider an unsubstantiated charge of disclosure of privileged documents.

Validity of Exculpatory Clause in Contract

In its cross-appeal, Port maintains that it is not liable to Gates because Donald Gates knowingly and willingly signed its contract which contains the following exculpatory clause:

"I understand I am responsible for the above boat, her personnel and equipment while she is on the mobile hoist or Harbor lands. I understand the Harbor District,

agents or personnel are not liable for damage to my vessel while it is on Harbor property or in hoist slips. In no way do I consider the Harbor District as an insurer. I am liable for any damages."

The trial court refused to give jury instructions proffered by either plaintiffs or defendants. Instead, the trial court instructed on this issue as follows:

"An exculpatory or 'hold harmless' clause is a clause contained in the contract which is intended by the parties to limit a party's liability in the event that one party should negligently cause damage or injury to the other party.

"Parties to a contract are free to insert such clauses in a contract. A party who by contract agrees to accept a risk of harm arising from the other party's negligence cannot recover for such harm. The law recognizes that such clauses are

valid so long as the clauses are not contrary to public policy.

"The exculpatory language purporting to excuse defendants from liability for damages may stand be enforced only if it does not involve or affect the 'public interest.' An attempted exemption from liability affects the public interest and is invalid if the transaction exhibits some or all of the following characteristics.

"1. It concerns a business of a type generally thought suitable for public regulation.

"2. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.

"3. The party holds himself out as willing to perform this service for any member of the public who seeks it or at

least for any member coming within certain established standards.

"4. As a result of the essential nature of the service in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services.

"5. In exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence; and

"6. Finally, . . . as a result of the transaction, the person or property of the plaintiff is placed under the control of the defendant subject to the risk of carelessness by the defendant or his agents."

This instruction correctly states the criteria provided by the Supreme Court. (Tunkl v. Regents of the University of California (1963) 60 Cal.2d 92, 98-101.)

In Gardner v. Downtown Porsche Audi (1986) 180 Cal.App.3d 713, the court held invalid an automobile repair garage's preprinted disclaimer of liability regarding loss of cars by theft. The appellate court held that such a disclaimer violates public policy based upon the criteria elucidated in Tunkl. Garages are suitable for public regulation. They perform a service of great importance to the public which need working cards to function in society. They hold themselves out as willing to perform the service for any member of the public. Garages possess a decisive advantage of bargaining strength against members of the public seeking their services. The garage included the exculpatory language in a standard printed

form which all customers were expected to sign before the garage began work on the car. Lastly, the security of the automobile was entirely in the hands of the garage owners and its employees. (Id., at pp. 718-720; see also Pelletier v. Alameda Yacht Harbor (1986) 188 Cal.App.3d 1551 [On two occasions, Alameda failed to prevent vandalism to boat which resulted in its sinking. Court held invalid exculpatory clause in harbor district lease for boat slip even though the case involved mere passive negligence.]; Salton Bay Marina, Inc. v. Imperial Irrigation District (1985) 172 Cal.App.3d 914 [Exculpatory clause purporting to discharge water district from liability for damage of injury by flooding held invalid.].)

Here, Port is a public entity authorized and regulated by statute. (Harb. & Nav. Code, § 6000 et seq.) As a common carrier, Port holds itself out to

the general public to perform necessary services regarding the operation and safety of vessels. Such services are of great importance to the boating public.

Because of the essential nature of its services to certain members of the public, and the limited availability of such services, Port possesses a decisive advantage in bargaining strength with the public. It is able to confront the public with the broad, vague and standardized printed contract presented to Mr. Gates. (And see Steven v. Fidelity & Casuality Co. (1962) 58 Cal.2d 862, 879.) Mr. Gates entrusted control of his boat to Port, a common carrier, subjecting himself to the risk of Port's carelessness.

The clause at issue is vague. Among other things, it is not clear exactly what the parties "bargained" for - exemption from violation of statutes, health and

safety laws, active negligence, passive negligence, vandalism, or acts of God.

"[A]n agreement which purports to release, indemnify or exculpate the party who prepared it from liability for that party's own negligence . . . must be clear, explicit and comprehensible in each of its essential details." (Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd. (1983) 147 Cal.App.3d 309, 318.)

This purported exculpatory clause is invalid because it is vauge, overbroad, violative of statute (see Civ.Code §§ 1668, 2175) and against public policy. As the appellate court stated in Gardner, "even assuming he read and understood it, we find the attempted exemption from liability to be against public policy and thus ineffective . . . ." (Gardner v. Downtown Porsche Audi, supra, 180 Cal.App.3d at p.715.)

Costs, Fees and Prejudgment Interest

There is no merit to Gates' contention that the trial court abused its discretion in striking his request for expert witness fees. Gates received less than his Code of Civil Procedure section 998, subdivision (d) offer.

Gates assigns error to the award of fees for depositions of certain individual defendants. Under Code of Civil Procedure section 1032, subdivision (b), "a prevailing party [e.g., one with a net monetary recovery - see subd. (a)(4)] is entitled as a matter of right to recover costs . . . ." "(a) The following items are allowable as costs under Section 1032: . . . [¶] (3) necessary depositions . . ." (Code Civ. Proc., § 1033.5.)

Here, the trial court ruled that Gates failed to show that these fees were unnecessary. The trial court allowed deposition fees for all witnesses except

those not called to testify at trial. The court did not abuse its discretion in its allocation of these costs. (Code Civ. Proc., §§ 1032, subds. (a)(4), (b); 1033.5, subd. (3).)

Gates contends that the trial court abused its discretion in denying them prejudgment interest on the contract action. Civil Code section 3287, subdivision (b) provides that one entitled "to receive damages based upon a cause of action in contract where the claim was unliquidated, may also receive interest thereon in the court's discretion." Here, Gates failed to recover on the contract; he recovered on negligence.

Gates also argues entitlement to recover prejudgment interest under Civil Code section 3287, subdivision (a). Under Civil Code section 3287, subdivision (a), one may recover "damages certain, or capable of being made certain by

calculation . . . ." This statutory rule does not apply when, as here, the amount of damages awarded "depends upon the jury's resolution of conflicting evidence." (Marine Terminals Corp. v. Paceco, Inc. (1983145 Cal.App.3d 991, 995.)

Code of Civil Procedure section 1021.5 states in pertinent part, "a court may award attorney's fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest it: (a) a significant benefit . . . has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate . . . ." (See Serrano v. Priest (1977) 20 Cal.3d 25, 35; Woodland Hills Residents Assn. Inc. v. City Council (1979) 23 Cal. 3d 917, 933-935.)

This action did not confer a significant benefit on the general public or on a large class of people not did it result in the enforcement of an important right affecting the public interest. This case is a personal negligence action, albeit heavily litigated. Any benefit conferred upon the public by the court's ruling the exculpatory contract invalid is coincidental to the action and is therefore not compensable by private attorney general fees. (Beach Colony II v. California Coastal Com. (1985) 166 Cal.App.3d 106, 114.)

Civil Code section 1717 states, in pertinent part: "(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the

party prevailing on the contract . . . shall be entitled to reasonable attorney's fees . . . and shall be an element of the costs of the suit."

"[T]he court . . . shall determine who is the party prevailing on the contract for purposes of this section . . . . Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section." (Emphasis added.)

Both Gates and defendants seek attorney's fees under Civil Code section 1717. Neither is entitled thereto. The trial court properly exercised its discretion in ruling that neither party prevailed on the contract for purposes of Civil Code section 1717. The trial court stated, and we agree, that this case is

"essentially a tort case for negligence." (See generally Jefferson v. J.E. French Co. (1960) 54 Cal.2d 717, 718-719; Boyd v. Oscar Fisher Col, Inc. (1989) 210 Cal.App.3d 368, 377; Both v. Wasco Public Utility Dist. (1976) 56 Cal.App.3d 353, 356-357.)

As the trial court explained to defendants, "your prevailing on your counterclaim is just in the nature of a minor set-off against the tort recovery. And that in every sense of the word, the plaintiff is the prevailing party in this case." The trial court sympathized with defense counsel by stating, "[i]t became a very difficult case and you should not have been put to that burden. But I know of no way to award you those fees."

When entreated to find under Civil Code section 1717 that defendants prevailed on the contract, the court said, "No. I don't find -- I can't find that. That

would be distorting the case to try to find that. Plaintiffs prevailed in this case. You had a minor setoff for the $2000, the unpaid bill." And, defense counsel conceded that it would be extremely hard to allocate attorney's fees as to individual defendants on the hauling bill.

Port's motion to dismiss Gates' appeal is denied. The judgment is affirmed. Parties to bear their own costs.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:STONE, P.J.

GILBERT, J.

State of California
Court of Appeal
Second Appellate District
Division Six

December 21, 1992

Robert Wandruff, Clerk
Supreme Court of California
303 Second St.
Eighth Floor
San Francisco, CA 94107

Re: GATES v. PORT SAN LUIS HARBOR DISTRICT
B057338
Filed: December 9, 1992

Dear Sir:

Pursuant to rule 978, subdivision (a) of the California Rules of Court, we enclose herewith copy of a letter requesting publication of the opinion in the above matter, along with copy of the opinion.

We do not recommend publication as the opinion does not, in our view, meet the required standards.

Very truly yours,

Kenneth R. Yegan
Associate Justice

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

Department No. I
Date: Wednesday, January 2, 1991
Present: Hon. Warren C. Conklin, Judge
Jeannie Gladson, Deputy Clerk
Wayne Fielder, Bailiff
Sheila Smith, Reporter

Title: Donald B. Gates and
Eva M. Gates Plaintiffs
v.
Port San Luis Harbor
District, et al. Defendants
and RELATED CROSS-ACTION

ACTION NO. 61331

Counsel: Plaintiffs: In Pro Per
Defendants: Steven J. Adamski

SPECIAL PROCEEDING: Jury Trial - Ninth day
SUMMARY OF MINUTE ORDER

9:00 AM Jury resumes deliberation

11:13 AM In chambers: Court takes up matter of documents which were this date FAXed to Judge Chapman. Counsel for defendant hands to the court a General Verdict prepared this dateMinute Order reflects that after 11:21 AM Judge Chapman rules as a matter of law that the exculpatory clause is not valid. Based upon the comments of Judge Chapman on the record, plaintiff withdraws its motion on the court's failure to rule as a matter of law. Judge Chapman rules on the record as to further jury instructions requested by plaintiff.

1:39 AM In chambers the court holds a conference call with Judge Chapman wherein he rejected Plaintiffs Proposed Special Findings and accepted Defendants' Special Verdict form.

2:38 PM The court informs the jury the General Verdict previously given to them is being replaced with a Special Verdict Form. The court instructs the jury as to BAJI 15.52.

2:40 PM Jury retires to resume deliberation.

6:47 PM Jury reaches verdict

SPECIAL VERDICT

Date:January 2, 1991

signed:Matthew M. Jaurequi
Foreperson

See page 47a

Trial is adjourned at 6:59 PM.

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF
SAN LUIS OBISPO

CIVIL CASE NO. 61331 January 28, 1991

DONALD B. GATES and
EVA M. GATES Plaintiffs

v.

PORT SAN LUIS HARBOR DISTRICT
JACK RODIN, JR., MARLIN STEBBINS,
NORMAN COY, JR., MATT COLLAR,
BILL BARROW and DOES 1 through 20,
inclusive Defendants

PORT SAN LUIS HARBOR DISTRICT
Cross-Complainant,

v.

DONALD B. GATES and EVA M. GATES,
Cross-Defendants

JUDGMENT AFTER TRIAL BY JURY

This action came on regularly for trial by jury on December 3, 1990, in the above-entitled Court, the Honorable Donald R. Chapman, Superior Court Judge, presiding. Plaintiffs Donald B. Gates and Eva M. Gates appeared in propria persona, and defendants Port San Luis Harbor District and Jack Rodin, Jr. appeared by their attorneys Steven J. Adamski, Bar No. 103977, and Sinsheimer, Schiebelhut &

Baggett, 1010 Peach Street, San Luis Obispo, CA 93401.

A jury of twelve (12) persons was regularly impaneled and sworn to try the action. Witnesses on the part of both plaintiffs and defendants were sworn and testified and documentary evidence was presented by both plaintiffs and defendants. After hearing the evidence and arguments of parties and counsel and after being instructed by this Court, the jury retired and commenced its deliberations on December 28, 1990. The jury subsequently, on January 2, 1991, at approximately 7:00 p.m., returned to Court and rendered in writing the following special verdicts:

SPECIAL VERDICT

We, the jury in the above case, find the following special verdict on the issues submitted to us:

ON COMPLAINT

A. NEGLIGENCE

1. Was defendant Port San Luis Harbor District negligent?
   Answer: Yes
2. Was Defendant Jack Rodin, Jr. negligent?
   Answer: Yes
3. Was the negligence of either Defendant a legal cause of injury to the property of Plaintiffs Donald B. Gates and Eva M. Gates?
   Answer: Yes

B. PREMISES LIABILITY

4. Do you find that the public property involved in this action was in a dangerous condition?

Answer: No

C. BREACH OF CONTRACT

8. Did Defendant Port San Luis Harbor District breach its contract with Plaintiffs Donald B. Gates and Eva M. Gates?
Answer: No

D. DAMAGES

10. What is the total amount of damages suffered by Plaintiffs as a legal result of the accident?
Answer: $35,000.00

E. HOLD HARMLESS CLAUSE

11. Is the exculpatory or "hold Harmless" clause contained in the contract executed by Plaintiff Donald B. Gates enforceable?
Answer: No

ON CROSS-COMPLAINT

12. Do you find that Cross-Defendants Donald B. Gates and Eva M. Gates breached the contract with Cross-Complainant Port San Luis Harbor District?
Answer: Yes

13. Was the breach a legal cause of injury to Cross-Complainant Port San Luis Harbor District?
Answer: Yes

14. What is the total amount of damages suffered by Cross-Complainant Port San Luis Harbor District as a result of the breach?
Answer: $1,919.95

It appearing that by reason of the foregoing special verdicts, plaintiffs are the "prevailing parties" and are entitled to judgment against defendants Port San Luis Harbor District and jack Rodin, Jr. on the complaint herein for damages: for interest; and for costs.

NOW, THEREFORE, IT IS ADJUDGED, ORDERED, AND DECREED that plaintiffs shall have and recover from defendants PORT SAN LUIS HARBOR DISTRICT and JACK RODIN, JR., as follows:

(1)the sum of thirty-five thousand dollars ($35,000);

(2)prejudgment interest thereon, pursuant to Civil Code §3287, and as prayed for in the complaint on file herein, from January 1, 1986 (the date of initial filing of the suit), to January 2, 1991 (date verdict returned), at the legal rate, in the sum of seventeen thousand five hundred nine and fifty-nine hundredths dollars ($17,509.59).
NOTE! Denied 1-16-91-RDC)

(3)postjudgment interest thereon at the rate of ten percent (10%) per annum from the date of the verdict until paid; and,

(4)costs and disbursements in the amount of $_____, pursuant to plaintiffs' Memorandum of Costs filed and served herein on January 4, 1991;
NOTE! according to proof - RDC)

It appearing that by reason of those special verdicts, defendant Port San Luis Harbor District is entitled to judgment against plaintiff Donald B. Gates on the cross-complaint herein for damages.

IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that defendant PORT SAN LUIS

HARBOR DISTRICT shall have and recover from plaintiff DONALD B. GATES as follows:

(1)the sum of one thousand nine hundred nineteen and ninety-five hundredths dollars ($1919.95);

(2)prejudgment interest thereon, pursuant to Civil Code §3287, from June 3, 1986 (the date cross-complaint filed), to January 2, 1991 (date verdict returned), at the legal rate, in the sum of eight hundred seventy-nine and forty-five hundredths dollars ($879.45); and,

(3)postjudgment interest thereon at the rate of ten percent (10%) per annum from the date of the verdict until paid.

DATED: January 16, 1991

/s/R. DONALD CHAPMAN
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

CIVIL ACTION NO. 61331

DONALD B. GATES and
EVA M. GATES — Plaintiffs

v.

PORT SAN LUIS HARBOR
DISTRICT, et al. — Defendants

PORT SAN LUIS HARBOR
DISTRICT, — Cross-Complainant

v.

DONALD B. GATES and
EVA M. GATES, — Cross-Defendants

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION AS TO PLAINTIFFS' EMOTIONAL DISTRESS CLAIMS

After full consideration of the evidence and points and authorities submitted and the oral argument by both parties, it appears and the Court finds that Defendants have shown by admissible evidence and reasonable inferences that the following issue is without substantial

controversy; and that there is no triable issue as to any material fact with respect thereto:

The claims of Plaintiffs Donald B. Gates and Eva M. Gates for emotional distress and other forms of personal injury are barred by the Torts Claim Act.

IT IS THEREFORE ORDERED that the foregoing issue shall be deemed established in favor of all Defendants and against Plaintiffs Donald B. Gates and Eva M. Gates. No further evidence or proof thereof shall be required at the trial of this action. Plaintiffs' claims for emotional distress and other forms of personal injury are hereby stricken from the Complaint in this action and the final judgment herein shall, in addition to any other matters determined at trial, be based upon the issues so established.

Dated: February 23, 1989

/s/HONORABLE HARRY L. WOOLPERT
Superior Court Judge

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

CIVIL ACTION NO. 61331

DONALD B. GATES and
EVA M. GATES Plaintiffs

v.

PORT SAN LUIS HARBOR
DISTRICT, et al. Defendants

PORT SAN LUIS HARBOR
DISTRICT, Cross-Complainant,

v.

DONALD B. GATES and
EVA M. GATES, Cross-Defendants.

POST TRIAL MOTION ORDERS

After due considerations of the papers submitted by both sides, the argument of plaintiffs and counsel, and the record before this Court, IT IS HEREBY ORDERED THAT:

(1) Plaintiffs' Motion for New Trial be DENIED;

(2) Plaintiffs' Motion for Judgment Notwithstanding Verdict be DENIED;

(3) Plaintiffs' Motion for Reconsideration to Award Prejudgment Interest or, in the Alternative Prejudgment Interest on the Contract CC 3287(b) be DENIED;

(4) Defendants' Motion for Judgment Notwithstanding the Verdict be DENIED; and

(5) Defendants' and Cross-Complainant's Motion for Attorneys' Fees be DENIED.

IT IS SO ORDERED.

Dated: March 28, 1992

/s/HON. R. DONALD CHAPMAN
Retired Superior Court Judge

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

CIVIL ACTION NO. 61331

DONALD B. GATES and
EVA M. GATES Plaintiffs

v.

PORT SAN LUIS HARBOR
DISTRICT, et al. Defendants

PORT SAN LUIS HARBOR
DISTRICT, Cross-Complainant,

v.

DONALD B. GATES and
EVA M. GATES, Cross-Defendants.

ORDER FOR ENTRY OF JUDGEMENT OF NONSUIT

After opening statement in which Plaintiffs stated all the facts that they intended to prove, counsel for Defendants Norman Coy, Jr., Matt Collar and Bill Barrow moved for judgment of nonsuit on the ground that from all of the asserted facts and inferences there is no evidence

facts and inferences there is no evidence of sufficient substantiality to support a judgment in favor of Plaintiffs and against any of these Defendants in that Plaintiffs failed to allege any facts or inferences that would support a finding of negligence as to any of these Defendants.

IT IS ORDERED THAT Defendants Norman Coy, Jr., Matt Collar and Bill Barrow recover judgment on the merits against Plaintiffs Donald B. Gates and Eva M. Gates, that the Complaint on file be dismissed as to these Defendants, and that Defendants recover their costs including allowable attorneys' fees, if any, against Plaintiffs.

Dated: January 16, 1991

/s/R. DONALD CHAPMAN
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

CIVIL ACTION NO. 61331

DONALD B. GATES and
EVA M. GATES — Plaintiffs

v.

PORT SAN LUIS HARBOR
DISTRICT, et al. — Defendants

PORT SAN LUIS HARBOR
DISTRICT, — Cross-Complainant,

v.

DONALD B. GATES and
EVA M. GATES, — Cross-Defendants.

ORDER FOR ENTRY OF JUDGMENT
(C.C.P. 630)

IT IS ORDERED THAT judgment on the merits be entered in favor of Defendant Marlin Stebbins and that Defendant Marlin Stebbins recover his costs including allowable attorneys' fees, if any, against Plaintiffs.

Dated: January 16, 1992

/s/R. DONALD CHAPMAN
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

CIVIL ACTION NO. 61331

DONALD B. GATES and
EVA M. GATES — Plaintiffs

v.

PORT SAN LUIS HARBOR
DISTRICT, et al. — Defendants

PORT SAN LUIS HARBOR
DISTRICT, — Cross-Complainant,

v.

DONALD B. GATES and
EVA M. GATES, — Cross-Defendants.

ORDER GRANTING SUMMARY ADJUDICATION OF ISSUES AS TO PLAINTIFFS' THIRD CAUSE OF ACTION AND JUDGEMENT ON THE PLEADINGS AS TO PLAINTIFFS' FOURTH AND FIFTH CAUSES OF ACTION

The motion of Defendants Jack Rodin, r., Marlin Stebbins, Norman Coy, Jr., att Collar and Bill Barrow ("Moving efendants") for summary adjudication of ssues or, in the alternative, for

judgment on the pleadings, came on for regular hearing before the Hon. Christopher G. Money on November 6, 1990.

After full consideration of the evidence and points and authorities submitted by both sides, and oral argument, it appeared and the Court found that Moving Defendants had shown by admissible evidence and reasonable inferences therefrom not contradicted by other evidence and inferences that the following issues are without substantial controversy; and that there is no triable issue as to any material fact with respect thereto:

(1) That up to an including the date of the alleged accident in October 1985, none of the Moving Defendants had the individual authority or duty to rectify any alleged defect in the Port San Luis Harbor District's mobil hoist facility or

the surrounding premises.

(2) No Moving Defendant had authority or control over the public funds needed to remedy any such defect.

(3) Only the Port San Luis Harbor District's Commission, action as a whole, held such authority.

(4) The Port San Luis Harbor District's mobil hoist facility and the surrounding land and water are all public property.

(5) Each of the Moving Defendants, at the time of the alleged incident and all times relevant, was either an employee, officer, or Commissioner of the Port San Luis Harbor District.

Accordingly, the COURT ORDERED THAT the foregoing issues be deemed established in favor of Moving Defendants and against Plaintiffs Donald B. Gates and Eva M. Gates and that no further evidence or

proof would be required at trial of this action, and that the final judgment shall, in addition to any other matters determined at trial, would be based upon the issues so established. Based on these findings, the COURT FURTHER ORDERED THAT Plaintiffs' Third Cause of Action for Premises Liability would be summarily adjudicated in favor of Moving Defendants and against Plaintiffs Donald B. Gates and Eva M. Gates.

The COURT FURTHER ORDERED THAT judgment on the pleadings be entered in favor of Moving Defendants and against Plaintiffs Donald B. Gates and Eva M. Gates as to Plaintiffs' Fourth and Fifth Causes of Action for Breach of Contract and Common Carrier/Bailment liability respectively.

IT IS SO ORDERED.

Dated: January 24, 1991

/s/CHRISTOPHER G. MONEY
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

CIVIL ACTION NO. 61331

DONALD B. GATES and
EVA M. GATES — Plaintiffs

v.

PORT SAN LUIS HARBOR
DISTRICT, et al. — Defendants

PORT SAN LUIS HARBOR
DISTRICT, — Cross-Complainant,

v.

DONALD B. GATES and
EVA M. GATES, — Cross-Defendants.

ORDER FOR ENTRY OF SUMMARY JUDGMENT

The motion of Defendants William S. King, Stewart Jenkins, Gerard L. Parsons, Jim Chambers, Jim Blecha and Dennis Johansen ("Moving Defendants") for summary judgment came on regularly before the Honorable Christopher G. Money on November 6, 1990.

After full consideration of the evidence and points and authorities submitted by both sides, and oral argument, it appeared and the Court found that Moving Defendants had shown by admissible evidence and reasonable inferences therefrom not contradicted by other evidence or inferences that the complaint has no merit as to Moving Defendants and that there is no triable issue of fact with respect thereto, and therefore Moving Defendants are entitled to judgment as a matter of law.

ACCORDINGLY, IT IS ORDERED THAT the said motion for summary judgment is GRANTED and judgment shall be entered forthwith as requested in said motion in favor of Defendants William S. King, Stewart Jenkins, Gerard L. Parsons, Jim Chambers, Jim Blecha and Dennis Johansen and against Plaintiffs Donald B. Gates and

Eva M. Gates.

Dated: January 24, 1991

/s/CHRISTOPHER G. MONEY
JUDGE OF THE SUPERIOR COURT

b/Trial.Prt/Gates.SJO

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

Department No. II
Date: Tuesday, August 23, 1988
Present: Hon. Barry Hammer, Judge
Jeannie Gladson, Deputy Clerk
Tom Keating, Bailiff
Cathy Wehinger, Report

Title: Donald B. Gates, et al.,
Plaintiffs
v.
Port San Luis Harbor
District, et al. Defendants

Counsel: Frederick Foss for Plaintiffs
Steven Adamski for Defendants

Action 61331

SPECIAL PROCEEDINGS: Motion to Impose Sanctions; Motion for Determination of Undisputed Issues; Motion for Ruling on Law; Motion to Vacate Discovery Orders

---

Counsel are present as indicated and argue the matters.

Counsel enter stipulation on the record as to Proposition 51.

The Motion to Impose Sanctions, etc., filed herein on May 9, 1988 is denied as to the issue of monetary sanctions, and granted as to the issue of compelling compliance with preliminary existing order.

The Motion to Impose Sanctions, etc., filed herein on June 8, 1988 is denied as to the issue of contempt, and granted as to the issues of compelling compliance with pre-existing orders and as to Sanctions in the amount of $164.

The Motion for Determination of Undisputed Issues is ordered off calendar.

The Motion for Ruling on Law is ordered off calendar.

The Motion to Vacate Discovery Ordered filed March 25, 1988 and April 19, 1988 is denied.

The court states that it has not dealt with the following two motions which were listed on the Law and Motion Calendar: Motion for Order Declaring that Requests for Admissions, etc., and Motion for Order Compelling Further Responses, etc.

Mr. Foss shall prepare the order, presenting same to opposing counsel for approval and to the court for execution.

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 6

January 5, 1993

Re: Gates, Donald B.
vs.
Port San Luis Harbor District
Rodin, Jack
2 Civil B057338
San Luis Obispo No. 61331

THE COURT:

Petition for rehearing denied.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DISTRICT SIX

Civil No. B073131
Sup. Court No. 61331
(San Luis Obispo County,
Harry Woolpert, Judge)

DONALD B. GATES and
EVA M. GATES Petitioners

v.

SUPERIOR COURT OF THE STATE OF
CALIFORNIA, FOR THE COUNTY OF
SAN LUIS OBISPO, Respondent.

PORT SAN LUIS HARBOR etc. et al.,

Real Party in Interest

ORDER

THE COURT:

We have read and considered the petition for writ of mandate filed on February 10, 1993.

We deny the petition. (Scott v. Municipal Court (1974) 40 Cal.App.3d 995, 996-997.)

Second Appellate District,
Division Six, NO. B057338
S030420

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

DONALD B. GATES et al.	Cross-Defendants and Appellants
v.	
PORT SAN LUIS HARBOR DISTRICT,	Cross-Complainant and Appellant
JACK RODIN, JR., et al.	Appellants

EXTENSION

The time for granting or denying review in the above cause is hereby extended to and including April 20, 1993, or the date upon which review is either granted or denied.

/s/ Mosk,
Mosk, Acting Chief Justice

March 15, 1993

NOTIFICATION TO CHIEF JUSTICE MALCOLM LUCAS, CALIFORNIA SUPREME COURT OF FELONY COMMITTED IN CASE

Chief Justice Malcolm Lucas
California Supreme Court
300 South Spring St.
North Tower
Los Angeles, CA 90013

Re: CV B057338, Gates, et al. v. Port San Luis Harbor District, et al.

Application to Extend Time for Filing Application for Hearing Extraordinary Writ, CRC Rule 43.

Dear Chief Justice or Presiding Justice:

We are care-givers to two single family members and have been out of the state tending to their business and did not receive the Court of Appeal's denial of our petition for extraordinary writ until March 5, 1993. We respectfully request extension of time beyond the 10 days in which to apply for hearing of the extraordinary writ in the Supreme Court, as the time within which the court may

order review on its own motion has not expired, pursuant to CRC, Rule 45(c).

As you may be aware we are representing ourselves due to our attorney's reluctance to go before the bench and pursue this case against the public entity. Further, it appears there has been a conspiracy to defraud committed in this case by either the court or defendants' attorneys, which is a crime against public justice. This felony of the changing of public records, out of court and off the record, is now under investigation by other authorities and is good cause for granting this application.

Applications granted after filing of the notice of appeal are as follows:

"Application of Respondents and Cross-Appellants for Continuance of Hearing Date from August 12, 1992 to November 20, 1992. Granted by the Court

of Appeal on July 20, 1992.

In the event the court grants this application for hearing we have enclosed our check No. 1084 in the amount of $250 for filing fee and addressed, postage prepaid envelopes and sufficient additional copies of the application for later mailing by the clerk.

Thank you for your consideration.

Sincerely,

/s/ Donald B. Gates

/s/ Eva M. Gates

CV B057338 Gates, et al v. Port San Luis Harbor District, et al.

SUPREME COURT OF CALIFORNIA
SAN FRANCISCO, CALIFORNIA

March 23, 1993

Donald B. Gates
Eva M. Gates
140 So. Dolliver St. #69
Pismo Beach, CA 93449

Re: S031682 - Gates, et al.
v. Superior Court
B073131

Dear Mr. & Mrs. Gates:

The application for relief from default and petition for review were presented to the court for its consideration.

The court directed that the petition for review be returned for the reason that it would not grant the permission necessary to allow the untimely filing. California Rules of Court, Rule 45 (c). Code of Civil Procedure Section 473. Also enclosed is your check for $250.00.

Returned is the original of the petition for review. If you desire return

of the additional copies, please notify our San Francisco office within 10 days.

Very truly yours,

ROBERT F. WANDRUFF
Court Administrator and
Clerk of the Supreme Court

/s/ John C. Rossi
By: John C. Rossi
Assistant Clerk-Admin.

Second Appellate District,
Division Six, No. B057338
S030420

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

DONALD B. GATES et al., Cross-Defendants and Appellants

v.

PORT SAN LUIS HARBOR DISTRICT, Cross-Complainant and Appellant

JACK RODIN JR. et al., Appellants

Appellants' petition for review DENIED.

LUCAS
Chief Justice

FILED: March 31, 1993

COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

FILED: April 5, 1993

RE: Gates, Donald B.
v.
Port San Luis Harbor District
Rodin, Jack
Divil B057338
San Luis Obispo No. 61331

* * REMITTITUR NOTICE * *

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above-entitled cause on 12/09/92 is now final.

** AFFIRMED IN FULL **

PORT'S MOTION TO DISMISS GATES' APPEAL IS DENIED.

Parties To Bear Their Own Costs.

Joseph A. Lane, Clerk

By:Mary J. Rosa
Deputy Clerk

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION SIX DATE: 04/06/93

Re: Gates, Donald B.
v.
Port San Luis Harbor District
Rodin, Jack
2 Civil B057338
San Luis Obispo No. 61331

THE COURT:

MOTION FOR STAY OF ISSUANCE OF REMITTITUR IS DENIED,
NO JURISDICTION.

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN LUIS OBISPO

DONALD B. GATES and
EVA M. GATES — Plaintiffs

v.

PORT SAN LUIS HARBOR
DISTRICT, et al., — Defendants.

CASE NO. 61331

ORDER ON JOINT APPLICATION
FOR TRIAL CONTINUANCE

The Joint Application of the paraties for continuance of trial in the above entitled matter came on regularly before the court for hearing, the Honorable Warren C. Conklin, Judge Presiding of the Superior Court of the State of California for the County of San Luis Obispo. There appeared Plaintiffs by and through their attorney of record GOLDENRING AND GOLDENRING: A Professional law Corporation by Peter A. Goldenring, Esq. through telephonic

conference with the court and Defendants by and through their attorney of record Sinsheimer, Schiebelhut & Baggett by Steven J. Adamski, Esq., personally. The court having read and considered the moving papers, and having heard argument of counsel, now ORDERS, ADJUDGES, AND DECREES that:

1. The trial date in the above-entitled matter presently set as March 20, 1990 is vacated.

2. Trial in the above-entitled matter is set for July 17, 1990 at 9:00 a.m. in the above-entitled court.

3. The court does not set a Mandatory Settlement Conference at this time but invites counsel to set such a settlement conference prior to trial after discovery is completed.

DATED: March 7, 1990

WARREN C. CONKLIN
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN LUIS OBISPO

Department No. I
Date: July 17, 1990
Present: Hon. Warren C. Conklin,Judge
Margaret Graves, Deputy Clerk
Wayne Fielder, Bailiff
Kathryn Erickson, Report

Proceedings: MASTER CALENDAR

Counsel: Plaintiffs: Failed to Appear
Defendants: Failed to Appear

Plaintiffs were present in Court.

Plaintiffs arranged trial date with Court Administrator.

CIVIL ACTION NO. 61331

DONALD B. GATES, et al. Plaintiffs

v.

PORT SAN LUIS HARBOR
DISTRICT, et al. Defendants

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

DONALD B. GATES and
EVA M. GATES — Plaintiffs

v.

PORT SAN LUIS HARBOR
DISTRICT, JACK RODIN, JR.,
MARLIN STEBBINS, NORM COY, JR.,
MATT COLLAR, BILL BARROW, and
DOES 1 through 20. — Defendants

PORT SAN LUIS HARBOR
DISTRICT — Cross-Complainant

v.

DONALD B. GATES and
EVA M. GATES — Cross-Defendants

CASE NO. 61331

EX PARTE MOTION FOR AN
ORDER TO REOPEN DISCOVERY

AND ORDER

Plaintiffs' motion to reopen discovery will be made pursuant to Code of Civil Procedure Section 2024(e) which provides for reopening discovery after a new trial date has been set, and on the

grounds that (1) the depositions sought were not taken by Plaintiffs prior counsel and are necessary to obtain relevant information for trial; (2) Plaintiffs have been diligent in seeking discovery but having relied on previous counsel, the depositions sought were not completed earlier because Counsel failed to schedule discovery and prepare for trial, prior to his motion to withdraw as Attorney of Record; (3) the trial is set for December 3, 1990, and there remains ample time to avoid interference with the trial as it is set in the Civil Trial Program and does not have to be worked into the regular court calendar; (4) trial date was initially set for March 20, 1990, Counsel requested a continuance to July 17, 1990, with neither Counsel preparing for trial, nor did they do further discovery after January 29, 1990;

(5) and in the event the Court grants the two pending motions of Defendants, the first motion being: Notice of Renewed Motion of Defendants Jack Rodin, Jr., Marlin Stebbins, Norman Coy, Jr., Matt Collar, Bill Barrow, William S. King, Stewart Jenkins, Gerard L. Parsons, Jim Chambers, Jim Blecha and Dennis Johansen for Summary Adjudication or, in the Alternative for Judgement on the Pleadings; the second motion: Renewed Motion of Defendants William S. King, Stewart Jenkins, Gerald L. Parsons, Jim Chambers, Jim Blecha and Dennis Johansen for Summary Judgement, there will be one remaining Defendant, Port San Luis Harbor District. There remains adequate time for this discovery and it would be an injustice to deprive Plaintiffs of these depositions of the District and the Defendants consultants.

This application is based on this notice, on all the pleadings, records, and papers on file herein, on the attached memorandum of points and authorities, and on the attached supporting declarations of Donald B. and Eva M. Gates filed herewith.

DATED: September 24, 1990

THE REQUEST IS DENIED. WOOLPERT

SEPTEMBER 25, 1990

Re: Gates, et al. v. Port San Luis Harbor District, et al. Letter Requesting Reconsideration to Reopen Discovery Civil Case No. 61331

The Honorable Harry Woolpert
Judges Chambers
County Government Center
San Luis Obispo, CA

Dear Judge Woolpert:

We are requesting you reconsider plaintiffs Exparte Motion to Reopen Discovery, which you heard and denied on September 24, 1990. At that time you stated that Plaintiffs should service Defendants immediately, on personal service, and set the motion as a routine motion to be heard in law and Motion, which requires 15 days notice.

Joan Miller, of the Clerk's Office, informed us and Mr. Adamski that the first available date for a hearing is October 25, 1990 and that even that calendar is full and she would be

"squeezing us in."

In the event Judge Money granted our motion on October 25, 1990, and we noticed the defendants immediately for the discovery we seek, there would not be sufficient time for notice. We bring it to the Court's attention that from October 25, 1990 to the cut off date for discovery of November 3, 1990 is a total of 8 days.

It seems if we are forced to subpoena these non-parties and documents at trial it will add a greater burden at trial without a proper review of documents, and will further add several days to trial.

Do you wish Plaintiffs to submit an Exparte motion for reconsideration or does the Court, on its own motion, wish to reconsider the matter due to the unavailability of a timely hearing date

on the Law and Motion calendar? Even if it were possible to schedule a hearing in 15 days from todays date, taking into account the notice time required to non-parties, out of town, a deposition could not be scheduled before October 29, 1990, which is 4 days before the cut-off date.

We phoned Mr. Adamski this morning to discuss the matter and informed him we were addressing you, if he wished to be present upon the delivery of this letter requesting reconsideration. A copy of this letter was later deliver to Mr. Adamski this morning.

We were told yesterday, by the Clerk's Office and the Superior Court Secretary, that they were unable to find our most recent file. This file must be made available to us today. Our previous attorney has withheld our file since Sept. 13, 1990 and the option has not

been available to us since July 17, 1990 to pursue this discovery but has been available to us only since Sept. 13, 1990.

DATED: September 25, 1990
TREATING THIS AS A MOTION TO RECONSIDER, THE MOTION IS DENIED. WOOLPERT

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

CIVIL CASE NO. 61331 April 17, 1989

DONALD B. GATES and
EVA M. GATES Plaintiffs

v.

PORT SAN LUIS HARBOR
DISTRICT, JACK RODIN, JR.,
MARLIN STEBBINS, NORMAN
COY, JR., MATT COLLAR,
BILL BARROW, and DOES 1
THROUGH 20, INCLUSIVE. Defendants

PORT SAN LUIS HARBOR
DISTRICT Cross-Complainant

v.

DONALD B. GATES and
EVA M. GATES Cross-Defendants

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

Plaintiffs' motion for protective order concerning the inspection of the Endless III now set on April 12, 1989 and demanded by all Defendants came on for regular hearing before this Court on

april 7, 1989.

Michael S. Krout appeared on behalf of the Plaintiffs. Steven J. Adamski appeared on behalf of the Defendants. After careful consideration of the memoranda and supporting documents submitted by both sides and the arguments of counsel, the Court hereby GRANTS the motion as to Defendant Port San Luis Harbor District. The motion is DENIED as to all other Defendants. The oral request for a protective order limiting the scope of the inspection and the number of individuals participating in the inspection is DENIED based on Defense counsel's representation that no more than three individuals will attend the inspection on behalf on the requesting Defendants. The request for sanctions is DENIED.

IT IS SO ORDERED.

Dated: April 17, 1989

/s/HARRY E. WOOLPERT
HONORABLE HARRY E. WOOLPERT

APPROVED AS TO FORM ONLY:

/s/ Michael S. Krout
Attorney for Plaintiffs

b/Plead/Order-HW.PSL

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

CIVIL CASE NO. 61331

DONALD B. GATES and
EVA M. GATES — Plaintiffs

v.

PORT SAN LUIS HARBOR DISTRICT, JACK RODIN, JR., MARLIN STEBBINS, NORMAN COY, JR., MATT COLLAR, BILL BARROW, and DOES 1 through 20 inclusive — Defendants

---

PORT SAN LUIS HARBOR DISTRICT — Cross-Complainant

v.

DONALD B. GATES and
EVA M. GATES — Cross-Defendants

TRIAL: December 3, 1990

PLAINTIFFS' MOTION IN LIMINE

Plaintiffs move in limine, before selection of the jury and commencement of trial, to restrict and exclude certain evidence and/or examination regarding certain facts in the presence of the jury. Relatedly, plaintiffs also move

for an advance ruling that one of their expert witnesses may testify at trial.

Specifically, plaintiffs move the court for an order: (1) instructing defendant and counsel not to refer to, comment on, examine regarding, or suggest to the jury in any way that the plaintiffs were at some stages of this litigation represented by counsel or that plaintiffs have had multiple counsel; (2) instructing defendant and counsel not to refer to, comment on, examine regarding, or suggest to the jury in any way any fact regarding the settlement offers and/or negotiations in this case, or the fact or amount of plaintiffs' offer to compromise; (3) instructing defendant and counsel not to refer to, comment on, examine regarding, or suggest to the jury in any way the existence or legal effect of the purported exculpatory clause in

the contract, at least until the court has made rulings on the admissibility of such testimony based on other testimony and the law;(4)instructing defendant and counsel not to refer to, comment on, examine regarding, or suggest to the jury in any way that one or more of the individual defendants as to which this court has previously granted summary judgment and/or judgment on the pleadings is responsible for damages sustained by plaintiffs in lieu of defendant harbor district;(5)instructing defendant and counsel not to refer to, comment on, examine regarding, or suggest to the jury in any way that the plaintiffs are not as a matter of law entitled to recover for loss of use, at least until the court has ruled on thereon; and (6)instructing defendant and counsel not to refer to, comment on, attempt to introduce, or

examine regarding, the deposition testimony and reports of Messrs. Odell and Shermer, until the court rules on the admissibility of such testimony based on other testimony and the law. Plaintiffs will also seek an advance ruling on the admissibility of the testimony by Dr. Adams, an economist, that they will seek to introduce at trial.

This motion is made on the grounds that the foregoing facts are either not relevant to this case, or if relevant, only so if the Court makes certain rulings on the legal issues herein, and that any attempt to expose the jury to such information would be highly prejudicial to plaintiffs, even if the jury was subsequently instructed to disregard it.

This motion is based upon the Notice of Plaintiffs' Intent to Make Motion in

Limine to Exclude Evidence dated November 28, 1990, this motion and accompanying memorandum of points and authorities, plaintiffs' trial brief, and the pleadings, records, and papers on file in this action.

MEMORANDUM OF POINTS & AUTHORITIES

General Authority

Motions in limine are non-statutory proceedings (California Judges Benchbook: Civil Trials §3.12(Cal CJER 1981)) in which counsel or the parties themselves appearing on their own behalf request that opposing counsel be instructed not to mention certain facts in the presence of the jury. See,e.g. Akins v. County of Sonoma(1967)67 Cal2d 185,197; Charbonneau v. Superior Court (1974)42 Cal.app3d 505, 507; see generally, 4 Cal Practice (Rev) Part 2§ 27:37. The gist and purpose of

the motion is to prevent opposing counsel from referring to either prejudicial (Evidence Code §352) and/or legally irrelevant matter (Evidence Code §350) which might create a negative inference in the jurors' minds. "It is the prejudicial effect of the questions asked or statements made in connection with the offer of the evidence, not the prejudicial effect of the evidence itself, which a motion in limine is intended to reach." Bridges v. City of Richardson(1962) 163 Tex 292,354 SW2d 366,367; see also Hyatt v. Sierra Boat Company (1978) 79 Cal app3d 325,337. Evidence prejudicial to the moving party may be sought to be excluded on the ground that it is legally irrelevant (Evidence Code §350) or that its probative value is substantially outweighed by the probability that its

admission will (a) necessitate undue consumption of time or (b) create substantial risk of undue prejudice, of confusing the issues, or of misleading the jury (Evidence Code §352). Motions in limine may also be used to exclude certain areas of testimony or reference to that testimony temporarily until the court makes decisions on the admissibility of such testimony based on other testimony and the law. See, e.g. Garfield v. Russell (1967) 251 CalApp2d 275.

Motions in limine may be made at any point before evidence is received or before it is offered, but are most commonly made at the outset of trial to ensure that opposing counsel will not refer to excludable evidence in his or her opening statement. See, e.g. 1 Cal. Civil Procedure During Trial §8.12 (Cal

CEB 1982, 1989). The motion may be made in writing or orally but San Luis Obispo Superior Court Rule 27.03 requires that counsel give written notice of the fact he or she intends to make such motions as a precondition to have the motion heard. Here, plaintiffs timely gave written notice of their intent to make this in limine motion.

EVIDENCE SOUGHT TO BE RESTRICTED OR EXCLUDED

1. Facts Relating to Plaintiffs' Counsel of Record and Pro Per Representation. Plaintiffs will represent themselves at trial in propria persona as they are permitted by law to do. Plaintiffs have, however, for most of the four and one-half year duration of these proceedings been represented by counsel, the court having allowed plaintiffs' last attorney to withdraw in September, 1990. Indeed,

plaintiffs have been represented at one time or another by seven attorneys due to various circumstances, including conflict (e.g. the Gallo firm), illness (e.g. Mitchell), or change in jobs (e.g. Gray). The fact of plaintiffs' pro per representation in light of their past representation by multiple counsel is not relevant to any issue in this case but if disclosed to the jury could raise an inference in the jury's mind that attorney's did not believe plaintiffs' case was meritorious. Such in inference would be highly prejudicial and, accordingly, plaintiffs ask for an order admonishing defendant, its counsel, and its witnesses not to attempt to introduce such information in any form, and not to suggest, comment directly or indirectly on, or refer to that information in any way before the jury.

2. Settlement Negotiations and Offers of Compromise. During the course of this litigation there have been intermittent settlement negotiations and both sides exchanged offers of compromise. Plaintiffs offer of compromise was for an amount very substantially less than the sum plaintiffs will ask the jury to award at trial. Such settlement negotiations, offers of compromise, or the fact or accounts of an unsuccessful settlement conference are not relevant to the issues and any mention in the jury's presence of that information would be prejudicial, especially insofar as plaintiffs low offer to compromise might raise an inference that plaintiffs only think their case is really worth that much. Accordingly, plaintiffs ask for an order admonishing defendant, its counsel, and its witnesses not to attempt to introduce

either the fact or the amount of such offer(s) to compromise in any form, and not to suggest, comment directly or indirectly on, or refer to that information in any way before the jury.

3. Exculpatory Clause. Defendant has alleged the existence of an exculpatory clause as an affirmative defense to its negligence and that of its agents and employees. Plaintiffs have contended, successfully to date, that defendant is not entitled to the benefit of that defense, relying, inter alia, on Civil Code §1668, Tunkle v. Regents of the University of California (1963) 60 Cal.2d 92, Pelletier v. Alameda Yacht Harbor (1986) 188 Cal. A113d 1551, and on the precedent and collateral estoppal effect of this court's (per Fredman, J.) decision in William H. Jones v. Port San Luis Harbor District, et al., San Luis

Obispo Superior Court Case Number 57527. This issue has been previously briefed and plaintiffs' argument is summarized again in their Trial Brief, pp.3-5. Here, the reference to the exculpatory clause in the jury's presence before a definitive ruling by the court after hearing other testimony would be prejudicial if in the end the court sustains plaintiffs' position that the defense is unavailable and the fact and operation of the clause inadmissible. Therefore, plaintiffs ask for an order admonishing defendant, its counsel, and its witnesses not to attempt to introduce either the fact of the clause or its purported operation and effect in any form, and not to suggest, comment directly or indirectly on, or refer to that evidence in any way before the jury, at least until this court has had the

opportunity to rule on its ultimate admissibility.

4. "Empty Chair" Defense. Plaintiffs originally named a number of individual defendants, including Port district directors and employees, whom plaintiffs alleged were in some way individually responsible for, or at least contributed to, the damages plaintiffs suffered. On November 6, 1990, this court (per Money, J.) granted motions for summary judgment and for judgment on the pleadings as to these individual defendants. (To date, no written order, judgment, or notice of entry of judgment has been served on plaintiffs, leaving the status of these individual defendants on the record uncertain and unresolved at the commencement of trial.) Plaintiffs submit that defendant district should be barred and estopped from now seeking to

introduce evidence or otherwise try to raise the inference that the plaintiffs' damages were the result of the acts of these other persons not now before the court. Plaintiffs further submit their position is buttressed by Proposition 51 (Fair Responsibility Act of 1986, codified at CC§1431.2). See generally, Motion for Determination of Undisputed Issue Declaring the Fair Responsibility Act of 1986 is Not Retroactive and is not Applicable in this Case, filed May 31, 1988. Accordingly, plaintiffs ask for an order admonishing defendant, its counsel, and its witnesses not to attempt to introduce evidence in any form that individual defendants no-longer before the court and not the district as entity are in fact responsible for plaintiffs damages, and not to suggest, comment directly or indirectly on, or refer to

such evidence in any way before the jury.

5. Damages for Loss of Use. In previous motions and papers filed in this proceeding, defendants have taken the position that plaintiffs are not entitled to recover damages for the give (5) years loss of use of their vessel Endless III inflicted and caused by defendant's negligence. See, e.g. Notice of Motion and Motion for Summary Adjudication as to Plaintiffs' Loss of Use Claims, dated November 28, 1989. The issue has been exhaustively briefed by the parties, plaintiffs arguing that admiralty law and jurisdiction purporting to restrict loss of use damages to "commercial" vessels do not apply here. Plaintiffs ask this court for an order admonishing defendant, it counsel, and its witnesses not to attempt to introduce or claim in any form that plaintiffs are not entitled to damages

for loss of use, and not to suggest, comment directly or indirectly on, or refer to that information in any way before the jury, unless and until this court rules on the admissibility of loss of use evidence.

6. Odell & Shermer Deposition Testimony. Odell and Shermer are witnesses defendant apparently intends to call as expert witnesses to testify at trial. Plaintiffs intend to object on a number of grounds to their testimony, for example on double hearsay grounds because Odell never actually inspected the accident scene nor did he personally conduct a full conditional damage survey of the vessel, basing his testimony primarily on other's reports and testimony. Pending a ruling by the court on the merit of plaintiffs' objections to these witnesses' testimony, either by deposition or in person, the

mention of their anticipated testimony in the presence of the jury is likely to be prejudicial and difficult to correct by a later instruction to disregard those comments. Therefore, plaintiffs ask for an order admonishing defendant, its counsel, and its witnesses not to attempt to introduce in any form testimony of Odell and/or Shermer, and not to suggest, comment directly or indirectly on, or refer to that testimony in any way before the jury, until the court rules on the admissibility of that evidence.

ADVANCE RULING ON EXPERT TESTIMONY

Plaintiffs also seek an advance ruling from the court confirming their right to call Dr. Adams, an economist, as a witness at trial. A timely decision will avoid prejudice from the uncertainty of Dr. Adams' status and permit more efficient planning and conduct of

plaintiffs' case. Briefly, it is anticipated that defendant will object to Dr. Adams' testimony on the ground that he was disclosed as an expert witness too late. Plaintiffs concede their disclosure of their intent to use Adams as an expert witness was several days later under C.C.P. §2034(c) but request a ruling that Adams may be called in their case in chief upon the grounds that (1) their disclosure of Adams, their production of expert witness declaration, reports, and writings, and their repeated offers to make Adams available for deposition constitute substantial and good faith compliance with the intent of the section, that no prejudice was caused to defendant, and does not constitute an "unreasonable" failure under §2034(j); (2) that the designation of Adams would independently be justified and allowed

under CCP §2034(h); and (3) that the designation of Adams is allowable under §2034(k) and (l). Accordingly, plaintiffs ask the court for an order that they may call Adams as an expert witness at trial.

CONCLUSION

For all the foregoing reasons, plaintiffs request that their motions in limine and for a ruling on Dr. Adams testimony at trial be granted.

DATED: December 3, 1990

Respectfully Submitted,

/s/ Donald B. Gates
DONALD B. GATES, Plaintiff
appearing in propria persona

/s/ Eva M. Gates
EVA M. GATES, Plaintiff
appearing in propria persona

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

CIVIL CASE NO. 61331 December 27, 1990

DONALD B. GATES and
EVA M. GATES Plaintiffs

v.

PORT SAN LUIS HARBOR
DISTRICT, JACK RODIN, JR.,
MARLIN STEBBINS, NORMAN
COY, JR., MATT COLLAR,
BILL BARROW, and DOES 1
through 20 inclusive. Defendants

PORT SAN LUIS HARBOR
DISTRICT Cross-Complainant

v.

DONALD B. GATES and
EVA M. GATES Cross-Defendants

PROPOSED JURY INSTRUCTIONS REQUESTED BY PLAINTIFFS: (1) EXCULPATORY CLAUSE/ASSUMPTION OF RISK: (2) STRICT LIABILITY

Plaintiffs hereby submit and deliver to the Court additional proposed instructions to the jury (including requested BAJI instructions) relating to the issues of the operation of the

purported exculpatory clause to the affirmative defense of assumption of risk; and strict liability and defendant Port of San Luis' admission of its common carrier status.

Exculpatory Clause. This Court yesterday indicated its intention to allow the exculpatory clause to go to the jury to determine whether it qualified for the public interest exception. For the reasons stated in their trial brief, in oral argument, and in their Supplemental Memorandum, plaintiffs' position remains that the purported exculpatory clause is on its face overbroad as a matter of law in that it attempts to avoid liability for any damage, including that caused by violation of statute, gross negligence, fraud, or even intentional acts, and that it must fail even before application of

the Tunkl criteria. See, e.g. Civil Code §§ 1668, 2175. Plaintiffs submit alternative instructions, the first reflecting plaintiffs' legal position and essentially instructing the jury to disregard the clause. However, in light of the Court's oral comments yesterday and the Court's decision to allow the jury to decide on the enforceability of the clause, plaintiffs also submit an alternative set of instructions which instructs the jury that if they find in favor of plaintiffs on one or more of the causes of action, they must decide under the six Tunkl criteria whether the transaction involves or affects the "public interest" and therefore, whether the exculpatory clause is enforceable. If they find it is not, that would be the end of their inquiry on this issue; but if they find it is enforceable, the jury

must further decide if defendants' actions constituted either violation of statute, gross negligence, or wilful wrong, in which case the clause is again rendered unenforceable.

Strict Liability. Plaintiffs supplement their previous instructions by including additional instruction on strict liability and defendant's status as a common carrier under their fourth cause of action, especially in light of defendants' apparent belated admission, contradicting their answer, that defendant Port San Luis Harbor District is a common carrier.

Plaintiffs reserve their right to submit, prior to argument, additional proposed instructions upon questions of law developed by the evidence in the defense case.

JURY INSTRUCTIONS REQUESTED:

(1) EXCULPATORY CLAUSE IN CONTRACT NOT A DEFENSE

In this action, defendant Port San Luis Harbor District has alleged as a defense to its liability for plaintiffs' damages and loss, the exculpatory or "hold-harmless" clause in the contract executed by plaintiff Donald Gates and defendant Port San Luis Harbor District.

I now instruct you that, as a matter of law, the defendant Port San Luis Harbor District cannot limit its liability or that of its agents and employees against its own negligence by the language in this contract and that any language or evidence to that effect would be void. Accordingly, you must disregard and give no effect or weight whatsoever to that language in the contract in determining liability and damages.

Authority: Tunkl v. Regents of the University of California, 60 Cal.2d 97, at 95 (1963) [citing England v. Lyon Fireproof Storage Co., 94 Cal.app.562 (1928)]; Civil Code §§1668,2175; see, generally, discussion in plaintiffs'

Supplemental Memorandum Re Exculpatory Clause, dated December 26, 1990.

(2) EXCULPATORY CLAUSE IN CONTRACT AS DEFENSE (Alternative)

In this action, defendant Port San Luis Harbor District has alleged as a defense to its liability for plaintiffs' damages and loss, the exculpatory or "hold-harmless" clause in the contract executed by plaintiff Donald Gates and defendant Port San Luis Harbor District. I will now instruct you on the law as it pertains to this defense.

The exculpatory language purporting to excuse defendant Port San Luis Harbor District from liability for damages may stand and be enforced only if it does not involve or affect the "public interest". An attempted exemption from liability affects the public interest and is invalid if the transaction exhibits some or all of the following characteristics:

1. The transaction, here a contract for hauling a boat, concerns a business of a type subject to or generally thought suitable for public regulation;

2. The party seeking to excuse liability, here defendant Port San Luis

Harbor District, is engaged in performing a service which is often a matter of practical necessity for some members of the public;

3. The party seeking to excuse its liability, here defendant Port San Luis Harbor District, holds itself out as willing to perform this service for any member of the public who seeks it, or at least for any members coming within certain established standards;

4. The party seeking to excuse its liability, here defendant Port San Luis Harbor District, possesses a decisive advantage of bargaining strength as compared to any member of the public who seeks its services;

5. The party seeking to excuse its liability, here defendant Port San Luis Harbor District, uses a standardized adhesion contract and makes no provision whereby the purchaser of services may pay additional fees and obtain protection against negligence; and,

6. As a result of the transaction, property of the purchaser of services is placed under the control of defendant Port San Luis Harbor District, subject to

the risk of carelessness by said defendant or its agents.

If you find that the transaction here does affect the "public interest" because it meets some of the above factors, then I instruct you that defendant Port San Luis Harbor District cannot limit its liability or that of its agents and employees against its own negligence by the language in this contract and that any language or evidence to that effect would be void. Accordingly, you must disregard and give no effect or weight whatsoever to that language in the contract in determining liability and damages.

Authorities: Tunkl v. Regents of the University of California, (1963) 60 Cal.2d 94, at 95-101; Pelletier v. Alameda Yacht Harbor (1986) 188 Cal.App.3d 1551, at 1555; Civil Code §§1668, 2175.

(3)VIOLATION OF LAW, GROSS NEGLIGENCE, WILFUL WRONG

If and only if you find that the transaction here does not affect the "public interest", then you must determine whether the defendants' actions

violated any statute, or constituted gross negligence or wilful wrong. I will now instruct you on what constitutes violation of law, gross negligence, and wilful wrong.

Violation of Law. If you find from the evidence that defendants violated the provision(s) of_____

_____[statute,ordinance, safety regulation] which I will read to you, and that such violation was a legal cause of plaintiffs' damages, then you are instructed that plaintiffs did not assume the risk of harm created by such violation and the defendant Port of San Luis Harbor District is not excused from liability by the exculpatory clause.

Gross Negligence. If you find from the evidence that defendants' actions were done not only negligently, but flagrantly or with a reckless or careless disregard for the safety of plaintiffs' property, you are instructed that plaintiffs did not assume the risk of harm created by such actions, and defendant Port of San Luis Harbor District is not excused from liability by the exculpatory clause.

Wilful Wrong. If you find from the evidence that defendant' actions were done wilfully, either with the intent to damage plaintiffs' property or with wanton disregard for the plaintiffs rights and property, you are instructed that plaintiffs did not assume the risk of harm created by such actions, and defendant Port of San Luis Harbor District is not excused from liability by the exculpatory clause.

Authorities: BAJI 4.33(as modified); Civil Code §§ 1668, 2175; Tunkl v. Regents, 60 Cal.2d 94, at 95-96. Blacks Law Dictionary.

(4)EXPRESS ASSUMPTION OF RISK

If you find that the exculpatory clause does not involve or affect the public interest as I have defined that term, and if you find that defendants did not violate law, or commit gross negligence or wilful wrong as I have defined those terms for you, then you must decide if assumption of risk is a defense to defendants' liability.

If, prior to an event in which the plaintiffs were damaged as a result of defendants' negligence, the plaintiffs,

and each of them, had expressly assumed the risk of such injury by specifically agreeing with the defendant that they would not hold the defendant responsible for any damage caused by defendant's negligence, the plaintiffs may not recover damages from the defendant for those damages.

Authorities: BAJI 4.30; CC §§1668, 2175.

BAJI 6.50

(5) DEFENDANT-A COMMON CARRIER

At the time of the accident in question, the defendant, Port San Luis Harbor District, was a common carrier operating a mobile boat hoist, on which the [plaintiffs'] vessel was freight for hire.

BAJI 6.53

(6) SAFE PLACE TO BOARD AND ALIGHT

It is the duty of a common carrier to select a reasonably safe place to receive or discharge freight.

(7) COMMON CARRIER LIABILITY

A common carrier of property is liable, from the time it accepts control of the property until it returns the property to the control and custody of

the owner, for the loss or injury thereof from any cause whatever, except: an inherent defect, vice, or weakness, or a spontaneous action, of the property itself; or any irresistible superhuman cause. Furthermore, you are instructed that a common carrier is liable, even in the two instances above, if its want of ordinary care exposes the property to the cause of the loss.

Authority: Civil Code §§2194, 2195.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

CIVIL CASE NO. 61331 January 2, 1991

DONALD B. GATES and
EVA M. GATES Plaintiffs

v.

PORT SAN LUIS HARBOR
DISTRICT, JACK RODIN, JR.,
MARLIN STEBBINS, NORMAN
COY, JR., MATT COLLAR,
BILL BARROW, and DOES 1
through 20 inclusive. Defendants

PORT SAN LUIS HARBOR
DISTRICT Cross-Complainant

v.

DONALD B. GATES and
EVA M. GATES Cross-Defendants

PLAINTIFFS OBJECT TO LIMITED JURY INSTRUCTIONS AND REQUEST REVIEW AND RECONSIDERATION OF JURY INSTRUCTIONS; AND JURY VERDICT FORMS

TO THE
HONORABLE JUDGE WARREN C. CONKLIN, JUDGE

of the above-entitled court, sitting-in for the Honorable R. Donald Chapman, visiting trial judge, hearing the above

entitled case; AND TO THE DEFENDANTS, AND EACH OF THEM, AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTE that Plaintiffs Donald B. Gates and Eva M. Gates request the Court review and reconsider for presentation to the jury the following instructions:

(1) 2.03 Wilful suppression of evidence. Defendants failed to produce at trial those documents demanded in Subpoena Duce Tecum served on Port San Luis Harbor District.

(2) Baji 3.45, Negligence per se- Violation of Statute, Ordinance, or Safety Order.

Defendants answer to the complaint as well as their affirmative defenses are based on various statutes, ordinances or safety orders. Therefore to deprive the jury of this instruction is an injustice

to Plaintiffs and a burden on the jury as it relates to Safety Codes violated by Port San Luis Harbor District.

(3) 3.77 Concurring Causes

(4) 3.78 Concurring Causes-either cause along sufficient

(5) 3.80 When precise cause cannot be identified

(6) 4.01 Res Ipsa Loquitur-necessary condition for application-accidental occurrence denied.

The above instructions are just and fair and should be presented to the jury as accidental occurrence has been denied and the cause of the accident was an instrumentality which was in the exclusive control of defendants.

(7) Baji 4.03 Res Ipsa Loquitur-where a presumption of negligence.

(8) Baji 6.50 Defendant-A Common Carrier.

(9) Baji 6.51 Duty of Common Carrier.

(10) Baji 11.50 Public Entity, Public Employee, Private Party-Distinction Between Bases of Liability. The Fair Responsibility Act of 1986 is not retroactive and therefore does not eliminate joint and several liability. Counsel stipulated, in open court, on August 23, 1988 that it does not apply in this case.

(11) Baji 11.52 Public Entity Liability-Failure to Discharge Mandatory Duty.

(12) Baji 11.65 Public Employee Liability-Dangerous Condition of Public Property-what Plaintiff Must Prove Against Public Employee.

(13) Baji 11.66 Public Employee-Actual Notice of Dangerous Condition.

(14) Baji 11.67 Public Employee-Contructive Notice of Dangerous Condition.

(15) Baji 14.02 (1986 Revision) Compensatory Damages-personal injury and Property Damage-Introductory for Special Verdict. The General Verdict Forms which now appear in the Court File make reference to compensatory damage only and the jury instructions regarding compensatory damages was refused, therefore the jury has not received instructions in this regard.

(16) Baji 14.22 (1986 Revision) Measure of Damages-Personal Property Loss of Use. Defendants have not shown good faith during the past five years, nor reasonable efforts to settle the claim. It is not reasonable to think that Plaintiffs have not been caused more than a few weeks of inconvenience and loss of use of their vessel/home, and the jury should be allowed instructions to that effect.

(17) Defendants' Special Proposed Jury Instructions No. 60 - Transition instruction (Pertaining to Bailment)

(18) Defendants Proposed Jury Instruction No. 61 - Definitions of Bailment, Bailor and Bailee.

(19) Exculpatory Clause in Contract Not a Defense, CC1668, 2175.

(20) Exculpatory Clause in Contract as a Defense (Alternative) 1668, 2175.

(21) Violation of Law, Gross Negligence, Wilful Wrong, Baji 4.33 C.C.1668, 2175.

(22) Baji 4.30; C.C. 1668, 2175 Express Assumption of Risk.

(23) Baji 6.50 Defendant-A Common Carrier

(24) Baji 6.53 Safe Place to Board and Alight

(25) Common Carrier Liability, C.C. 2194, 2195.

Plaintiffs request that the word "proximate" be stricken as incorrect

standard and "legally" be used to conform to instructions as have been given to the jury.

Plaintiffs respectfully request the above jury instructions be submitted to the jury and that the jury be allowed to have the written instructions in the jury room, at all times.

OFFICE OF THE COUNTY
CLERK-RECORDER
COUNTY OF SAN LUIS OBISPO

Receipt 66098

Date: 12/31/90
Time: 10:44 am

Clerk: JHG

Re: CV61331

Case Name: GATES VS PORT SAN LUIS HARBOR DISTRICT

Description: Copy Charges $6.00

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF
SAN LUIS OBISPO

CIVIL CASE NO. 61331 December 31, 1990

DONALD B. GATES and
EVA M. GATES Plaintiffs

v.

PORT SAN LUIS HARBOR DISTRICT
JACK RODIN, JR., MARLIN STEBBINS,
NORMAN COY, JR., MATT COLLAR,
BILL BARROW and DOES 1 through 20,
inclusive Defendants

PORT SAN LUIS HARBOR DISTRICT
Cross-Complainant,
v.
DONALD B. GATES and EVA M. GATES,
Cross-Defendants

GENERAL VERDICT

We, the Jury in the above-entitled case, find in favor of Plaintiffs DONALD B. GATES and EVA M. GATES and against Defendant PORT SAN LUIS HARBOR DISTRICT.

We further find the total amount of compensatory damages suffered by the plaintiffs and proximately caused by the acts of defendant to be: $_____

Dated: _____ _____
Foreperson

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF
SAN LUIS OBISPO

CIVIL CASE NO. 61331

DONALD B. GATES and
EVA M. GATES Plaintiffs

v.

PORT SAN LUIS HARBOR DISTRICT
JACK RODIN, JR., MARLIN STEBBINS,
NORMAN COY, JR., MATT COLLAR,
BILL BARROW and DOES 1 through 20,
inclusive Defendants

PORT SAN LUIS HARBOR DISTRICT
Cross-Complainant,

v.

DONALD B. GATES and EVA M. GATES,
Cross-Defendants

GENERAL VERDICT

We, the Jury in the above-entitled case, find in favor of Plaintiffs DONALD B. GATES AND EVA M. GATES and against Defendant JACK RODIN, JR.

We further find the total amount of compensatory damages suffered by the plaintiffs and proximately caused by the acts of defendant to be: $_____.

Dated:_____ _____
FOREPERSON

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF
SAN LUIS OBISPO

CIVIL CASE NO. 61331

DONALD B. GATES and
EVA M. GATES Plaintiffs

v.

PORT SAN LUIS HARBOR DISTRICT
JACK RODIN, JR., MARLIN STEBBINS,
NORMAN COY, JR., MATT COLLAR,
BILL BARROW and DOES 1 through 20,
inclusive Defendants

PORT SAN LUIS HARBOR DISTRICT
Cross-Complainant,

v.

DONALD B. GATES and EVA M. GATES,
Cross-Defendants

GENERAL VERDICT

We the Jury in the above-entitled case, find in favor of the Defendant PORT SAN LUIS HARBOR DISTRICT and against Plaintiffs DONALD B. GATES and EVA M. GATES.

Dated:_____ _____
FOREPERSON

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF
SAN LUIS OBISPO

CIVIL CASE NO. 61331

DONALD B. GATES and
EVA M. GATES Plaintiffs

v.

PORT SAN LUIS HARBOR DISTRICT
JACK RODIN, JR., MARLIN STEBBINS,
NORMAN COY, JR., MATT COLLAR,
BILL BARROW and DOES 1 through 20,
inclusive Defendants

PORT SAN LUIS HARBOR DISTRICT
Cross-Complainant,

v.

DONALD B. GATES and EVA M. GATES,
Cross-Defendants

GENERAL VERDICT

We, the Jury in the above-entitled case, find in favor of Defendant JACK RODIN, JR. and against Plaintiffs DONALD B. GATES and EVA M. GATES.

Dated:_____ _____
FOREPERSON

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF
SAN LUIS OBISPO

CIVIL CASE NO. 61331

DONALD B. GATES and
EVA M. GATES Plaintiffs

v.

PORT SAN LUIS HARBOR DISTRICT
JACK RODIN, JR., MARLIN STEBBINS,
NORMAN COY, JR., MATT COLLAR,
BILL BARROW and DOES 1 through 20,
inclusive Defendants

PORT SAN LUIS HARBOR DISTRICT
Cross-Complainant,

v.

DONALD B. GATES and EVA M. GATES,
Cross-Defendants

GENERAL VERDICT
(Cross-Complaint)

We, the Jury in the above-entitled case, find in favor of Plaintiffs DONALD B. GATES and EVA M. GATES and against Defendant PORT SAN LUIS HARBOR DISTRICT.

Dated:_____ _____
FOREPERSON

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF
SAN LUIS OBISPO

CIVIL CASE NO. 61331

DONALD B. GATES and
EVA M. GATES Plaintiffs

v.

PORT SAN LUIS HARBOR DISTRICT
JACK RODIN, JR., MARLIN STEBBINS,
NORMAN COY, JR., MATT COLLAR,
BILL BARROW and DOES 1 through 20,
inclusive Defendants

PORT SAN LUIS HARBOR DISTRICT
Cross-Complainant,

v.

DONALD B. GATES and EVA M. GATES,
Cross-Defendants

GENERAL VERDICT
(Cross-Complaint)

We, the Jury in the above-entitled case, find in favor of Defendant PORT SAN LUIS HARBOR DISTRICT and against Plaintiffs DONALD B. GATES and EVA M. GATES.

We further find the total amount of compensatory damages suffered by defendant and proximately caused by the acts of plaintiffs to be: $_____.

Dated:_____ _____
FOREPERSON

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF
SAN LUIS OBISPO

CIVIL CASE NO. 61331

DONALD B. GATES and
EVA M. GATES Plaintiffs

v.

PORT SAN LUIS HARBOR DISTRICT
JACK RODIN, JR., MARLIN STEBBINS,
NORMAN COY, JR., MATT COLLAR,
BILL BARROW and DOES 1 through 20,
inclusive Defendants

PORT SAN LUIS HARBOR DISTRICT
Cross-Complainant,

v.

DONALD B. GATES and EVA M. GATES,
Cross-Defendants

January 2, 1991

GENERAL VERDICT

VERDICT ON COMPLAINT

1. As to Plaintiffs DONALD B. GATES' and EVA M. GATES' cause of action for breach of contract against Defendant PORT SAN LUIS HARBOR DISTRICT:

_____ We, the Jury in the above case, find in favor of Plaintiffs DONALD B. GATES and EVA M. GATES and against Defendant PORT SAN LUIS HARBOR DISTRICT.

_____ We, the jury in the above action, find in favor of Defendant PORT SAN LUIS HARBOR DISTRICT and against Plaintiffs DONALD B. GATES and EVA M. GATES.

2. As to Plaintiffs DONALD B. GATES' and EVA M. GATES' cause of action for negligence against DEFENDANTS PORT SAN LUIS HARBOR DISTRICT AND JACK RODIN, JR.,:

_____ We, the Jury in the above case, find in favor of Plaintiffs DONALD B. GATES and EVA M. GATES and against Defendant PORT SAN LUIS HARBOR DISTRICT.

_____ We, the Jury in the above case, find in favor of Plaintiffs DONALD B. GATES and EVA M. GATES and against Defendant JACK RODIN, JR.

_____ We, the Jury in the above case, find in favor of Defendant PORT SAN LUIS HARBOR DISTRICT and against Plaintiffs DONALD B. GATES and EVA M. GATES.

_____ We, the Jury in the above-entitled case, find in favor of Defendant JACK RODIN, JR. and against Plaintiffs DONALD B. GATES and EVA M. GATES.

3. As to Plaintiffs DONALD B. GATES' and EVA M. GATES' Claim for Premises Liability against DEFENDANT PORT SAN LUIS HARBOR DISTRICT:

_____ We, the Jury in the above case, find in favor of Plaintiffs DONALD B. GATES and EVA M. GATES and against Defendant PORT SAN LUIS HARBOR DISTRICT.

_____ We, the jury in the above case, find in favor of Defendant PORT SAN LUIS HARBOR DISTRICT and against Plaintiffs DONALD B. GATES and EVA M. GATES.

4. If any of the above findings are

in favor of Plaintiffs DONALD B. GATES and EVA M. GATES and against Defendant PORT SAN LUIS HARBOR DISTRICT and/or DEFENDANT JACK RODIN, JR., we, the jury in the above entitled action assess damages in favor of Plaintiffs DONALD B. GATES and EVA M. GATES in the sum of $_____.

Dated:_____ _____
FOREPERSON

VERDICT ON CROSS-COMPLAINT

5. As to Cross-Complainant PORT SAN LUIS HARBOR DISTRICT's Cross-Complaint for breach of contract against Cross-Defendants Donald B. Gates and Eva M. Gates:

_____ We, the jury in the above case, find in favor of Cross-Complainant PORT SAN LUIS HARBOR DISTRICT, and against Cross-Defendants DONALD B. GATES AND EVA M. GATES, and assess damages in the sum of

$_____.

_____ We, the jury in the above case, find in favor of Cross-Defendants DONALD B. GATES AND EVA M. GATES and against Cross-Complainant PORT SAN LUIS HARBOR DISTRICT.

Dated:_____ _____
FOREPERSON

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF
SAN LUIS OBISPO

CIVIL CASE NO. 61331

DONALD B. GATES and
EVA M. GATES Plaintiffs

v.

PORT SAN LUIS HARBOR DISTRICT
JACK RODIN, JR., MARLIN STEBBINS,
NORMAN COY, JR., MATT COLLAR,
BILL BARROW and DOES 1 through 20,
inclusive Defendants

PORT SAN LUIS HARBOR DISTRICT
Cross-Complainant,

v.

DONALD B. GATES and EVA M. GATES,
Cross-Defendants

January 2, 1991

SPECIAL INTERROGATORIES

1. Was Defendant Port San Luis Harbor District negligent?

Answer: Yes___ No___

2. Was Defendant Jack Rodin Jr. negligent?

Answer: Yes___ No___

If you answered either question 1 or 2 yes, answer question 3:

3. Was the negligence of either Defendant a legal cause of the injury to the property of Plaintiffs Donald B. Gates and Eva M. Gates?

Answer: Yes___ No___

If you answered question 3 yes, answer question 4:

4. Is the hold harmless agreement signed by Plaintiff Donald B. Gates enforceable?

Answer: Yes___ No___

Dated:_____ _____
FOREPERSON

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF
SAN LUIS OBISPO

CIVIL CASE NO. 61331

DONALD B. GATES and
EVA M. GATES
Plaintiffs

v.

PORT SAN LUIS HARBOR DISTRICT
JACK RODIN, JR., MARLIN STEBBINS,
NORMAN COY, JR., MATT COLLAR,
BILL BARROW and DOES 1 through 20,
inclusive
Defendants

PORT SAN LUIS HARBOR DISTRICT
Cross-Complainant,

v.

DONALD B. GATES and EVA M. GATES,
Cross-Defendants

January 2, 1991

PROPOSED SPECIAL FINDINGS RE NEGLIGENCE, PREMISES LIABILITY, BREACH OF CONTRACT, AND PUBLIC INTEREST

Plaintiffs propose that the following special findings, along with BAJI 15.51, be submitted to the jury in addition to the general verdict forms prepared by

defendants (with correction and substitution of "legally" for "proximately"), pursuant to the phone conferences on January 2, 1991, between the parties and the trial judge:

If your verdict is in favor of plaintiffs, please answer the following questions:

QUESTION NUMBER 1: Were any of the defendants negligent?

Answer "yes" or "no" after the name of each defendant.

	YES	NO
ANSWER: Defendant PORT SAN LUIS HARBOR DISTRICT	____	____
Defendant JACK RODIN, JR.	____	____

If you answer Question No. 1 "yes" as to any defendant, then answer Question No. 2 as to each such defendant.

QUESTION NUMBER 2: As to each defendant that you answered "yes" to in response to question Number 1, was such negligence a legal cause of damage to the plaintiffs?

Please answer "yes" or "no" after the name of each such defendant.

YES NO

ANSWER: Defendant

PORT SAN LUIS HARBOR DISTRICT

____ ____

Defendant

JACK RODIN, JR.

____ ____

QUESTION NUMBER 3: Was the public property in question in a dangerous condition at the time of the accident in question? Answer "yes" or "no".

ANSWER: _____

QUESTION NUMBER 4: Was the dangerous condition of the public property a legal cause of damages to the plaintiffs? Answer "yes" or "no"

ANSWER: _____

QUESTION NUMBER 5: Did defendant PORT SAN LUIS HARBOR DISTRICT breach its contract? Answer "yes" or "no".

ANSWER: _____

QUESTION NUMBER 6: Did plaintiffs DONALD GATES and EVA GATES breach their contract? Answer "yes" or "no".

ANSWER: _____

QUESTION NUMBER 7: Does the exculpatory or "hold-harmless" clause in the contract involve or affect the "public interest"? Answer "yes" or "no".

ANSWER: _____

DATED: _____ _____
JURY FOREPERSON

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF
SAN LUIS OBISPO

CIVIL CASE NO. 61331

DONALD B. GATES and
EVA M. GATES Plaintiffs

v.

PORT SAN LUIS HARBOR DISTRICT
JACK RODIN, JR., MARLIN STEBBINS,
NORMAN COY, JR., MATT COLLAR,
BILL BARROW and DOES 1 through 20,
inclusive Defendants

PORT SAN LUIS HARBOR DISTRICT
Cross-Complainant,

v.

DONALD B. GATES and EVA M. GATES,
Cross-Defendants

January 2, 1991

[REVISED]

PROPOSED SPECIAL FINDINGS
RE NEGLIGENCE, PREMISES LIABILITY
BREACH OF CONTRACT, AND PUBLIC INTEREST

Plaintiffs propose that the following special findings, along with BAJI 15.51 be submitted to the jury in addition to the

general verdict forms prepared by defendants (with correction and substitution of "legally" for "proximately"), pursuant to the phone conference on January 2, 1991, between the parties and the trial judge:

After you have reached a verdict and the foreperson has signed the general verdict form provided to you, please answer the following questions in light of the evidence in this case and this Court's instructions on the law to apply to this case:

QUESTION NUMBER 1: Were any of the defendants negligent?

Answer "yes" or "no" after the name of each defendant.

	YES	NO
ANSWER: Defendant PORT SAN LUIS HARBOR DISTRICT	____	____

Defendant

JACK RODIN, JR. ____ ____

If you answer Question No. 1 "yes" as to any defendant, then answer Question No. 2 as to each such defendant.

QUESTION NUMBER 2: As to each defendant that you answered "yes" to in response to question Number 1, was such negligence a legal cause of damage to the plaintiffs?

Please answer "yes" or "no" after the name of each such defendant.

YES NO

ANSWER: Defendant

PORT SAN LUIS HARBOR DISTRICT

____ ____

Defendant

JACK RODIN, JR.

____ ____

QUESTION NUMBER 3: Was the public property in question in a dangerous condition at the time of the accident in question?

Answer "yes" or "no".

ANSWER: _____

QUESTION NUMBER 4: Was the dangerous condition of the public property a legal cause of damages to the plaintiffs? Answer "yes" or "no"

ANSWER: _____

QUESTION NUMBER 5: Did the damages to the plaintiffs occur in a way which was reasonably foreseeable as a consequence of the dangerous condition of the property? Answer "yes" or "no".

ANSWER: _____

QUESTION NUMBER 6: Did defendant PORT SAN LUIS HARBOR DISTRICT breach its contract? Answer "yes" or "no".

ANSWER: _____

QUESTION NUMBER 7: Did plaintiffs DONALD GATES and EVA GATES breach their contract? Answer "yes" or "no".

ANSWER: _____

QUESTION NUMBER 8: What is the total amount of damages, if any, suffered by the plaintiffs as a legal result of the accident?

ANSWER: _____

QUESTION NUMBER 9: Does the transaction that was the subject of the contract concern an activity generally thought suitable for public regulation? Answer "yes" or "no".

ANSWER: _____

QUESTION NUMBER 10: Is defendant PORT SAN LUIS HARBOR DISTRICT engaged in performing a service of great importance to the public which is often a matter of practical necessity for some members of the public? Answer "yes" or "no".

ANSWER: _____

QUESTION NUMBER 11: Does defendant PORT SAN LUIS HARBOR DISTRICT hold itself out

as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards? Answer "yes" or "no".

ANSWER: _____

QUESTION NUMBER 12: Does defendant PORT SAN LUIS HARBOR DISTRICT confront the public with a standardized adhesion contract of exculpation and make no provision whereby a purchaser, such as plaintiffs, may pay additional reasonable fees and obtain protection against negligence? Answer "yes" or "no".

ANSWER: _____

QUESTION NUMBER 13: As a result of the transaction, was the plaintiffs' property placed under control of defendant PORT SAN LUIS HARBOR DISTRICT, subject to the risk of carelessness by said defendant or its agents? Answer "yes" or "no".

ANSWER: _____

DATED: _____ _____
JURY FOREPERSON

CALIFORNIA CIVIL CODE §1717.
ACTION ON CONTRACT; AWARD OF ATTORNEY'S FEES AND COSTS; PREVAILING PARTY; DEPOSIT OF AMOUNTS IN INSURED, INTEREST-BEARING ACCOUNT; DAMAGES NOT BASED ON CONTRACT

(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract.

Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract which is entered into after the effective date of this section. Any provision in any such contract which provides for a waiver of attorney's fees is void.

(b)(1)The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as

provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section.

(2) Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section.

Where the defendant alleges in his or her answer that he or she tendered to the plaintiff the full amount to which he or she was entitled, and thereupon deposits in court for the plaintiff, the amount so tendered, and the allegation is found to be true, then the defendant is deemed to be a party prevailing on the contract within the meaning of this section.

Where a deposit has been made pursuant to this section, the court shall, on the application of any party to the action, order the deposit to be invested in an insured, interest-bearing account. Interest on the amount shall be allocated to the parties in the same proportion as the original funds are allocated.

(c) In an action which seeks relief in addition to that based on a contract, if the party prevailing on the contract has damages awarded against it on causes of action not on the contract, the amounts awarded to the party prevailing on the contract under this section shall be deducted from any damages awarded in favor of the party who did not prevail on the contract. If the amount awarded under this section exceeds the amount of damages awarded the party not prevailing on the

contract, the net amount shall be awarded the party prevailing on the contract and judgment may be entered in favor of the party prevailing on the contract for that net amount.

CALIFORNIA GOVERNMENT CODE §53051

Statement of public agency

(a) Within seventy (70) days after the date of commencement of its legal existence, the governing body of each public agency shall file with the Secretary of State on a form prescribed by the Secretary of State and also with the county clerk of each county in which the public agency maintains an office, a statement of the following facts:

1. The full, legal name of the public agency.
2. The official mailing address of the governing body of the public agency.
3. The name and residence or business address of each member of the governing body of the public agency.
4. The name, title, and residence or business address of the chairman, president, or other presiding officer, and clerk or secretary of the governing body of such public agency.

(b) Within 10 days after any change in the facts required to be stated pursuant to subdivision (a), an amended statement containing the information required by subdivision (a) shall be filed as provided therein. The information submitted to the Secretary of State shall be on a form prescribed by the Secretary of State.

(c) It shall be the duty of the Secretary of State and of the county clerk of each county to establish and maintain an indexed "Roster of Public Agencies," to be so designated, which shall contain all information filed as required in subdivisions (a) and (b), which roster is hereby declared to be public record.

CALIFORNIA CODE OF CIVIL PROCEDURE
§1032

Prevailing party in any action or proceeding; stipulation to alternative procedures

(a) As used in this section, unless the context clearly requires otherwise:
(1) "Complaint" includes a cross-complaint.
(2) "Defendant" includes a cross-defendant or a person against whom a complaint is filed.
(3) "Plaintiff" includes a cross-complainant or a party who files a complaint in intervention.
(4) "Prevailing party" includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. When any party recovers other than monetary relief and in situations other than as specified, the "prevailing party" shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under Section 1034.

(b) Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.

(c) Nothing in this section shall

prohibit parties from stipulating to alternative procedures for awarding costs in the litigation pursuant to rules adopted under Section 1034.

(Added by Stats.1986, c 377, §6)

CALIFORNIA CODE OF CIVIL PROCEDURE
§1033.5
(ITEMS ALLOWABLE)

(a) The following items are allowable as costs under Section 1032:

(1) Filing, motion, and jury fees.

(2) Juror food and lodging while they are kept together during trial and after the jury retires for deliberation.

(3) Taking, videotaping, and transcribing necessary depositions including an original and one copy of those taken by the claimant and one copy of depositions taken by the party against whom costs are allowed, and travel expenses to attend depositions.

(4) Service of process by a public officer, registered process server, or other means, as follows:

(A) When service is by a public officer, the recoverable cost is the fee authorized by law at the time of service.

(B) If service is by a process server registered pursuant to Chapter 16 (commencing with Section 22350) of Division 8 of the Business and Professions Code, the recoverable cost is the amount actually incurred in effecting service, including, but not limited to, a stakeout or other means employed in locating the person to be served, unless such charges are successfully challenged by a party to the action.

(C) When service is by publication, the recoverable cost is the sum actually incurred in effecting service.

(D) When service is by a means other than that set forth in subparagraph (A), (B) or (C), the recoverable cost is the lesser of the sum actually incurred, or

the amount allowed to a public officer in this state for such service, except that the court may allow the sum actually incurred in effecting service upon application pursuant to paragraph (4) of subdivision (c).

(5) Expenses of attachment including keeper's fees.

(6) Premiums on necessary surety bonds.

(7) Ordinary witness fees pursuant to Section 68093 of the Government Code.

(8) Fees of expert witnesses ordered by the court.

(9) Transcripts of court proceedings ordered by the court.

(10) Attorney fees, when authorized by either of the following:

(A) Contract

(B) Statute.

(11) Court reporters fees as established by statute.

(12) Models and blowups of exhibits and photocopies of exhibits may be allowed if they were reasonably helpful to aid the trier of fact.

(13) Any other item that is required to be awarded to the prevailing party pursuant to statute as an incident to prevailing in the action at trial or on appeal.

(b) The following items are not allowable as costs, except when expressly authorized by law:

(1) Fees of experts not ordered by the court.

(2) Investigation expenses in preparing the case for trial.

(3) Postage, telephone, and photocopying charges, except for exhibits.

(4) Costs in investigation of jurors or in preparation for voir dire.

(5) Transcripts of court proceedings not ordered by the court.

(c) Any award of costs shall be subject to the following:

(1) Costs are allowable if incurred, whether or not paid.

(2) Allowable costs shall be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation.

(3) Allowable costs shall be reasonable in amount.

(4) Items not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion.

(5) When any statute of this state refers to the award of "costs and attorney's fees," attorney's fees are an item and component of the costs to be awarded and are allowable as costs pursuant to subparagraph (B) of paragraph (10) of subdivision (a). Any claim not based upon the court's established schedule of attorney's fees for actions on a contract shall bear the burden of proof. Attorney's fees allowable as costs pursuant to subparagraph (B) of paragraph (10) of subdivision (a) may be fixed as follows: (A) upon a noticed motion, (B) at the time a statement of decision is rendered, (C) upon application supported by affidavit made concurrently with a claim for other costs, or (D) upon entry of default judgment. Attorney's fees allowable as costs pursuant to subparagraph (A) of paragraph (10) of subdivision (a) shall be fixed either upon

a noticed motion or upon entry of a default judgment, unless otherwise provided by stipulation of the parties.

Attorney's fees awarded pursuant to Section 1717 of the Civil Code are allowable costs under Section 1032 as authorized by subparagraph (A) of paragraph (10) of subdivision (a)

(Added by Stats.1986, c 377, § 13. Amended by Stats.1987, c 1080, § 8.5; Stats.1989, c 1416, § 26; Stats.1990, c. 804 (A.B. 3331), § 1.

3 WITKIN CALIFORNIA PROCEDURE 3RD (1985)
ACTIONS, SECTION 119

(3) [§119]
Negligent Violation of Contract

The cases allowing alternative contract actions where the breach was an intentional tort (supra, §114 et seq.), are in sharp contract with the authorities refusing to allow contract actions where the breach was a negligent act. (See infra, §§121, 122.) On principle, however, there is no reason why the plaintiff should be denied a right of action for breach of contract in this latter situation.

Thus, in the early case of Chapman v. California (1894) 104 C.690, 38 P. 457, plaintiff sued the state, alleging that he paid wharfage charges to its officers and that they took and negligently lost his goods. The cause arose prior to the statute allowing suit against the state for negligence of officers, but the state was liable on contracts. Held, the suit was properly brought as an action for damages for breach of contract. Negligence of a wharfinger "would be a breach of the terms of his contract . . . and under our practice the owner or consignee may sue upon the contract for the damages sustained by reason of such negligence." (104 C. 695.)

In Crawford v. Duncan (1923), 61 C.A. 647, 215 P. 573, plaintiff alleged that defendant doctor orally agreed in 1917 to treat a swelling on his neck with radium, and orally warranted that any scar would disappear within a year or two

from the time of treatment; and that in 1920, when the action was brought, a large scar remained. Held, the 1-year statute of limitations for personal injuries was not a bar. "This is not an action of tort. That is, it is not an action for malpractice based upon negligence. It is an action for the breach of an alleged oral agreement whereby defendant warranted that his radium treatments would not leave a permanent scar." (61 C.A. 650.) (But see Rubino v. Utah Canning Co. (1954) 123 C.A.2d 18, 266 P.2d 163, infra, §406, disapproving Crawford case on the limitations point; 43 Cal. L. Rev. 546.)

This theory received additional approval in L.B. Laboratories v. Mitchell (1952 39 C.2d 56, 244 P.2d 385. Defendant, an accountant, agreed in writing to prepare and file various tax returns for plaintiff. He was guilty of delay in reviewing their records, late filing of returns and making improper deductions. As a result penalties were paid by plaintiff. Defendant contended that the action was in tort for malpractice (negligence) and governed by the 2-year statute of limitations. (infra, §438.) Held, the action came within the 4-year written contract statute. The complaint alleged a cause of action for breach of the contract of employment (failure to carry out his promise), and the pleader's use of the term "negligently" did not make it a tort action. (39 C.2d 60.) Distinguishing the typical malpractice case against a doctor (infra. §121), the court said that the defendant herein contracted to do a specific thing: to file the returns in

the time required by law. "It differs in that respect from an action against a physician who does not agree to achieve any particular result; he merely agrees to act in a nonnegligent manner. Even in the physician cases it would not be doubted that if a doctor is specifically employed to remove a wart from the patient's foot but removes one from his face, there would be a breach of contract." (39 C2d 63.)

In Langley v. Pacific Gas & Elec. Co. (1953) 42 C.2d 655, 662, 262 P. 2d 846, classification was unnecessary to support recovery, but the court by dictum approved the alternative theories of recovery: "By undertaking to supply electricity to plaintiff, defendant obligated itself to exercise reasonable care toward him, and failure to exercise such care has the characteristics of both a breach of contract and a tort."

In Depenbrok v. Kaiser Foundation Health Plan (1978) 79 C.A.3d 167, 171, 144 C.R. 724, although a judgment for plaintiff was reversed for error in instructions, the court, following Crawford v. Duncan (supra), and similar cases, said: "[I]f a plaintiff can prove to a properly instructed jury that a surgeon has clearly promised a particular result(as distinguished from a mere generalized statement that the result will be good), and that the patient consented to an operation or other procedure in reliance on that promise, there can be recovery on the theory of warranty (or, to give the theory its more accurate name, breach of contract)."

Other decisions recognizing the right to elect the contract action are

Stark v. Wellman (1892) 96 C. 400, 401, 31 P. 259 [negligence of bailee]; Justis v. Atchison, Topeka & Santa Fe Ry. Co. (1910) 12 C.A. 639, 641, 108 P. 328 [negligence of carrier resulting in injury to passenger]; ;Jacobs v. Northern Pac. Ry. Co. (1925) 71 C.A. 42, 234 P. 328 [negligence of carrier resulting in injury to goods]; Trisdale v. Shasta County Title Co. (1956) 146 C.A.2d 831, 304 P.2d 832 [purchaser's action on contract against negligent title insurance company not barred by contributory negligence]; Estep v. Budger Mfg. Co. (1958) 164 C.A.2d 119, 123, 330 P.2d 298 [negligent performance of contract to install gas heater in trailer; heater blew up and injured plaintiff; contract venue proper]. (See 11 A.L.R.4th 748 [action against dentist for breach of contract to achieve particular result or cure]; 7 U.C. Davis L. Rev. 84 [contractual liability of physicians].)

The strangest of the cases is one which invokes the contract theory to defeat recovery. In Kings Laboratories v. Yucaipa Valley Fruit co. (1936) 18 C.A.2d 47, 62 P.2d 1054, defendant prevailed upon plaintiff warehouseman to store peaches illegally at less than the statutory rate. In plaintiff's suit for charges, defendant cross-complained seeking damages for deterioration of the fruit due to alleged gross negligence. Judgment for defendant was reversed, "If it be assumed that an action in tort could have been maintained," it nevertheless appeared from the allegations that the cross-complainant was relying upon "a duty arising from a

special contract" and the "gravamen of the complaint is a breach of the contract." Hence the action was one for damages for breach of contract, and illegality of the contract was a bar to recovery. (18 C.A.2d 52.) It need scarcely be pointed out that this analysis is almost the exact opposite of that employed in the carrier cases (infra, §§121, 122), in which the action is held to be solely in tort.

3 WITKIN CALIFORNIA PROCEDURE 3RD (1985)
ACTIONS, SECTION 119, 1992 SUPPLEMENT

(3) [§119]
Negligent Violation of Contract

See Von Batsch v. American Dist. Tel. Co. (1985) 175 C.A.3d 1111, 1120, 222 C.R. 239, citing L. B. Laboratories v. Mitchell, test, p. 148.

The issue of alternative contract or tort action for negligent performance of a contract was presented in an unusual context in Perry v. Robertson (1988) 201 C.A.3d 333, 247 C.R. 74. Plaintiff engaged defendant real estate brokers to sell her home. In this action she alleged that defendants were negligent in drafting the written sales agreement and escrow instructions, as a result of which she received substantially less than the market value as the sales price. After a favorable verdict she filed a motion for an award of costs and attorneys' fees under the listing agreement, which provided that "[I]f action be instituted to enforce this agreement, the prevailing party shall receive reasonable attorney's fees and costs as fixed by the Court." Defendants opposed the motion on the ground that plaintiff had pursued her cause of action as in tort rather than in contract. The trial judge made the award and defendants appealed. Held, affirmed; the complaint sufficiently pleaded a claim in contract, and the damages sought were consistent with a remedy either in contract or tort.

(1)Under the statutory rule of "one form of civil action" and the "primary right" theory of pleading, a single cause

of action framed in ultimate facts may sound in tort or contract. (201 C.A.3d 339, citing the text, §119 et seq., and Pleading, §§21, 23, 26.)

Thus, where a contract gives rise to a duty of care, negligence as to the duty may give rise to a cause of action for breach of contract. (201 C.A.3d 340, citing the text.)

(b)Older cases maintaining the opposing view have been criticized (201 C.A.3d 342, footnote 5, 343), and should be limited to the particular contexts in which they arose. "These case cannot mean that the plaintiff, injured by negligent failure to perform a contractual duty, has no remedy on a breach of contract theory. If that were so the established doctrine of alternative tort/contract remedies would be utterly meaningless." (201 C.A.3d 343.)

(2) [§122]
Analysis and Criticism

The cases discussed in the preceding section seem open to the following criticisms:

(a)Those which purport to construe the pleadings are wrong in following the discredited doctrine of construction against the pleader. (see Pleading, §402 et seq.) And the unexplained preference for the tort form when the pleadings are uncertain is in direct conflict with other decisions (equally mystifying) stating that in doubtful cases the contract theory is favored. (Nathan v. Locke (1930) 108 C.A. 158, 161, 287 P. 550, 291 P. 286; Peterson v. Sherman (1945) 68 C.A.2d 706, 711, 157 P.2d 863; Estep v. Budger Mfg. Co. (1958) 164 C.A.2d 199, 123, 330 P.2d 298.)

(b)Those which purport to declare a rule of law that the contract merely creates the legal duty of care and that the "gravamen" of the action is tort are mistaken in their analysis and wrong in principle. The substantive law give the plaintiff a right to substantial performance of the contract, and a failure to render such performance, whether intentional or negligent, is a breach of contract. The substantive law also give the plaintiff an interest in his personal security and property rights, and an invasion of either of those interests by a negligent act is a tort. The "gravamen" of the action is to be found in the right which the plaintiff

chooses to assert, since he may assert either of the two. Of course he cannot have double recovery for the same wrong by giving it two labels, but the election of the form of action is obviously one for him to make, and not one for the court to force upon him.

(c)The underlying theory implicit in these cases appears to be this: The plaintiff should not be permitted to "gain an advantage" such as a favorable limitation, venue or attachment statute, by the "arbitrary" choice of a form of action; the statutes are to be uniformly applied to all actions which in substance are the same. Thus, in Williamson v. Pacific Greyhound Lines (1944) 67 C.A.2d 250, 256, 153 P.2d 990, the court said: "Any other rule would lead to hopeless confusion regarding the proper venue of an action in ordinary negligence cases for personal injuries received." This explanation begs the question, as may be seen by recasting the proposition to reach the opposite conclusion: The plaintiff should not be put to a disadvantage and deprived of a favorable limitation, venue or attachment statute by having an arbitrary form of action forced upon him. If the plaintiff has a contract right to assert, his choice of that form is no more arbitrary than that of any other plaintiff. The evil (if any) lies in the statutes which determine such matters as venue and attachment on the basis of the tort or contract form of the action. It is possible to draft statutes which will apply uniformly to personal or property injuries regardless of the nature of the wrong. (See, e.g., alternative theory of decision in the

Basler case, supra, §121: statute of limitations "for injury" caused by "wrongful act or neglect" applies even though cause of action is contractual.) But while the statutes retain the classification of contract and tort, the plaintiff injured by his promisor has certain advantages over the plaintiff injured by a stranger, and cannot justly be deprived of them.

(d)These cases ignore an equally long and respectable line of decisions giving the plaintiff free choice of contract or tort forms of action for the express purpose of gaining such advantages as a favorable limitation, venue or attachment statute. (See supra, §113 et seq.) If the plaintiff in the intentional tort cases may elect the contract form, and in the quasi-contract cases may avail himself of a common law fiction (waiver of tort), what objection can there be to his doing so in negligence cases?

(e)Finally, these cases are squarely in conflict with decisions which recognize an election of a contract action in negligence cases. (See Justis v. Atchison, Topeka & Santa Fe Ry. Co. (1910) 12 C.A. 639, 641, 108 P. 328; Jacobs, Malcolm & Burtt v. Northern Pac. Ry. Co. (1925) 71 C.a. 42, 234 P. 328; Depenbrok v. Kaiser Foundation Health Plan (1978) 79 C.a.3d 167, 171, 144 C.R. 724; supra §119.)

A distinguishable situation is presented where allowance of the tort action would circumvent the policy of a statute. (See Boyd v. Boyd (1964) 228 C.A.2d 374, 382, 39 C.R. 400, 4 Summary, Torts, §458, citing the text [C.C. 43.5

abolished actions for breach of marriage promise; no action for negligent breach of the contract]; see also supra, §111.

(6) [§152]
Action Not Related to Fee Provision

In Sciarrotta v. Teaford Const. Co. (1980) 110 C.A.3d 444, 167 C.R. 889, the court confronted a question of first impression: whether C.C. 1717 applies in a case in which "the contract provides for attorney's fees only in favor of one party who is sued successfully by the other to enforce a contractual right not the subject of the attorney fee provision." (110 C.A.3d 447.)

The contract was a standard form building contract providing for fees to be awarded to the contractor should it be forced to sue the owner for "the contract price." The action was brought by plaintiff owners for breach of the agreement to construct a house "in a substantial and workmanlike manner." Plaintiffs offered the following policy argument in support of their position: If the defendant sues to enforce the only part of the contract benefiting it and prevails, it is entitled to fees; in order to achieve equality, plaintiffs who sue to enforce the only part of the contract benefiting them should be entitled to fees, and C.C. 1717 should be interpreted accordingly to cover any action. (110 C.A.3d 448,449.)

The court rejected the argument, and construed the statute narrowly, limiting reciprocity to the specific provisions of the contract in which attorneys' fees are provided. (110 C.A.3d 450, 451.) A dissenting justice thought the majority's

holding revived the evils of one-sided attorneys' fees clauses. (See 13 Pacific L.J. 242.)

The 1983 Legislature limited the Sciarrotta holding by adding the following to C.C. 1717(a):

"Where a contract provides for attorney's fees, as set forth above, such provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract."

(7) Fees Awarded as Costs.

(aa) [§153] Rule Developed by Cases.

Where a statute gives the right to fees, they are recoverable as costs under the cost bill procedure (see supra, §118 et seq.). (T.E.D. Bearing Co. v. Walter E. Heller & Co. (1974) 38 C.A.3d 59, 112 C.R. 910; Beneficial Standard Properties v. Scharps (1977) 67 C.A.3d 227, 136 C.R. 549; for exception where statute specifies that attorneys' fees are separate from costs, see Garcia v. Ebeling Motor Co. (1949) 89 C.A.2d 688, 201 P.2d 854, Jurisdiction, §22.) Where fees are provided for by contract, however, they are recoverable as special damages which must be pleaded and proved (see Pleading, §892). (See Jurisdiction, §23.)

In accordance with these general rules, fees recoverable under C.C. 1717 are treated as costs. (See Jurisdiction, §23.) However, this statute makes it possible for a party who both prevails in

an action on the contract and has a right to fees under the contract to recover them either as costs under the statute or as damages under the contract. In this situation, the party can elect which procedure to follow (Beneficial Standard Properties v. Scharps, supra, 67 C.A.3d 232; see also De La Cuesta v. Superior Court (1984) 152 C.A.3d 945, 949, 200 C.R. 1 [association which chose not to seek attorneys' fees under C.C. 1717 in unsuccessful action by purchasers to enjoin association's nonjudicial foreclosure did not lose right to recover fees under deeds of trust in its subsequent foreclosure action].)

In Beneficial Standard Properties v. Scharps, supra, a sublease contained a provision that, "in the event either party" brings legal proceedings to enforce the terms, the successful party "shall then be entitled to receive . . . attorney's fees." Plaintiff sublessor sued defendant sublessee, and each party pleaded the provision and sought attorneys' fees in the event that he prevailed. Plaintiff received judgment with an award of costs, and filed a memorandum of costs including an items for the attorneys' fees. Defendant moved to tax costs, and the trial judge entered an order denying the item of attorneys' fees on the ground that where a contract provides for them, they are recoverable only as special damages which must be alleged and demanded in the complaint. Held, order reversed. The only requirement to bring C.C. 1717 into operation is that one of the parties to the contract becomes the prevailing party in the action. (67 C.A.3d 231.) "The end

result is therefore the same as in T.E.D. Bearing in that Beneficial had rights to attorneys' fees by contract and also by statute, and therefore an option as to the procedure to follow." (67 C.A.3d 232.)

However, where the right to attorneys' fees exists only under C.C. 1717, they are recoverable only as costs. (Moulin Elec. Corp. v. Roach (1981) 120 C.A.3d 1067, 1069, 175 C.R. 111 [prevailing party had right to postjudgment attorneys' fees under C.C. 1717, but not under contractual provision, where on earlier appeal court had affirmed a summary judgment on express ground of no valid contract].)

Herzog v. Riel (1979) 99 C.A.3d Supp. 12, 160 C.R. 510, emphasizes the necessity of election. Plaintiffs recovered judgment for breach of contract in the sum of $2,647.86 plus costs and $700 attorneys' fees. Defendant had filed a cross-complaint, and a separate judgment was given for cross-defendants (plaintiffs), who thereupon filed a cost memorandum claiming attorneys' fees of $4,222.65. The judge allowed this amount, less the $700 previously awarded. Held, reversed. Under Beneficial Standard Properties, supra, the party must elect to recover the fees as damages under the contract or to claim them as costs; i.e.,he must follow either procedure but not both. Since plaintiffs had exercised the option to submit their claim to the court as damages, additional fees as costs could no longer be demanded (99 C.A.3d Supp.15.)

7 WITKIN CALIFORNIA PROCEDURE 3RD (1985)
JUDGMENT,
SECTIONS 152a & 153 1992 SUPPLEMENT

(6a) [§152A] (New) Offset for Damages on Other Causes of Action.

An action may seek relief in addition to that based on a contract. If damages on a noncontract cause of action are awarded against the party prevailing on the contract cause of action, an award of attorneys' fees under C.C. 1717 is deducted from that award of damages. If the award under C.C. 1717 exceeds the damages on the noncontract cause of action, the party prevailing on the contract is entitled to the net amount. (C.C. 1717(c), added in 1987.)

(aa) [§153] Rule Developed by Cases

Recovery as costs under statute or as damages under contract: See M.C. & D. Capital Corp. v. Gilmaker (1988) 204 C.A.3d 671, 676, 251 C.R. 178, quoting the text.

CALIFORNIA GOVERNMENT CODE, SECTION 814

§814. Statute's inapplicability to contractual liability or nonmonetary relief.

Nothing in this part affects liability based on contract or the right to obtain relief other than money or damages against public entity or public employee.

Added Stats 1963 ch 1681 § 1.

Legislative Committee Comment:

The various provisions of this part determine only whether a public entity or public employee is liable for money or damages. These provisions do not create any right to any other type of relief, nor do they have any effect on any other type of relief that may be available against a public entity or public employee.

The doctrine of sovereign immunity has not protected public entities in California from liability arising out of contract. <u>This section makes clear that this statute has no effect on the contractual liabilities of public entities or public employees.</u>

This section also declares that the provisions of this statute relating to liability of public entities and public employees have no effect upon whatever right a person may have to obtain relief other than money or damages. Thus, for example, even though Section 820.6 provides that public employees are not liable for enforcing unconstitutional statutes, and even though public entities have a similar immunity under Section 815

and 815.2, the right to enjoin the enforcement of unconstitutional statutes will still remain. Under this statute as limited by this section, the appropriate way to seek review of discretionary governmental actions is by an action for specific or preventive relief to control the abuse of discretion, not by tort actions for damages.

AMENDMENT XIV

[Citizen's Rights]

Section 1. Citizenship; Due process; Equal protection.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representation; Power to produce apportionment.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representative in Congress, the Executive and Judicia officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridges, exempt for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. Disqualification to hold office.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two-thirds of each House remove such disability.

Section 4. Public debt not to be questioned.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for service in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. Power to enforce amendment

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CONSTITUTION OF STATE OF CALIFORNIA
ARTICLE VI, SECTION 13

§13. Overturning erroneous judgments
No judgment shall be set aside, or new trial granted in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

Adopted November 8, 1966.

Prior Law: Identical to former Art VI §4½, as adopted October 10, 1911, amended November 3, 1914.

§998.Rejection of offer; Payment by rejecting party where more favorable judgment not obtained.

(a)The costs allowed under Sections 1031 and 1032 shall be withheld or augmented as provided in this section.

(b)Not less than 10 days prior to commencement of trial, any party may serve an offer in writing upon any other party to the action to allow judgment to be taken in accordance with the terms and conditions stated at that time.

(1)If the offer is accepted, the offer with proof of acceptance shall be filed and the clerk or the judge shall enter judgment accordingly.

(2)If the offer is not accepted prior to trial or within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence upon the trial.

(3)For purposes of this subdivision, a trial shall be deemed to be actually commenced at the beginning of the opening statement of the plaintiff or counsel, and if there is not opening statement, then at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence.

(c)If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment, the plaintiff shall not recover his or her costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court, in its discretion, may require the plaintiff to

pay the defendant's costs from the date of filing of the complaint and a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, the preparation or trial of the case by the defendant.

(d)If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment, the court in its discretion may require the defendant to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, the preparation or trial of the case by the plaintiff, in addition to plaintiff's costs.

(e)If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment, the costs under this section shall be deducted from any damages awarded in favor of the plaintiff. If the costs awarded under this section exceed the amount of the damages awarded to the plaintiff the net amount shall be awarded to the defendant and judgment shall be entered accordingly.

(f)Police officers shall be deemed to be expert witnesses for the purposes of this section; plaintiff includes a cross-complainant and defendant includes a cross-defendant. Any judgment entered pursuant to this section shall be deemed to be a compromise settlement.

(g)This chapter does not apply to an offer which is made by a plaintiff in an eminent domain action.

(h)The costs for services of expert witnesses for trial under subdivisions (c) and (d) shall not exceed those specified in Section 68092.5 of the Government Code.

CALIFORNIA CODE OF CIVIL PROCEDURE §1021

§1021. Compensation of attorneys; Costs to parties

Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided.

CALIFORNIA GOVERNMENT CODE §6200

§6200. Offenses by official custodian.

Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his or her hands for any purpose, is punishable by imprisonment in the state prison for two, three, or four years if, as to the whole or any part of the record, map, book, paper, or proceeding, the officer willfully does or permits any other person to do any of the following:
(a) Steal, remove, or secrete.
(b) Destroy, mutilate, or deface.
(c) Alter or falsify.

CALIFORNIA GOVERNMENT CODE §6201

§6201. Offenses by persons other than officers

Every person not an officer referred to in Section 6200, who is guilty of any of the acts specified in that section, is punishable by imprisonment in the state prison, or in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars ($1,000), or by both such fine and imprisonment.

Amended Stats 1983 ch 1092 § 130, effective September 27, 1983, operative January 1, 1984.

CALIFORNIA PENAL CODE TITLE 7
CRIMES AGAINST PUBLIC JUSTICE, CHAPTER 4
FORGING, STEALING, MUTILATING, AND
FALSIFYING JUDICIAL AND PUBLIC RECORDS
AND DOCUMENTS, §115

§115. Procuring or offering false or forged instrument for record; violations; punishment

(a) Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this state, which instrument, if genuine, might be filed, registered, or recorded under any law of this state or of the United States, is guilty of a felony.
(b) Each instrument which is procured or offered to be filed, registered, or recorded in violation of subdivision (a) shall constitute a separate violation of this section.
(c) Except in unusual cases where the interests of justice would best be served if probation is granted, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any of the following person:
(1) Any person with a prior conviction under this section who is again convicted of a violation of this section in a separate proceeding.
(2) Any person who is convicted of more than one violation of this section in a single proceeding, with intent to defraud another, and where the violations resulted in a cumulative financial loss exceeding one hundred thousand dollars ($100,000).

(d) For purposes of prosecution under this section, each act of procurement or of offering a false or forged instrument to be filed, registered, or recorded shall be considered a separately punishable offense.

CALIFORNIA PENAL CODE, TITLE 7
CRIMES AGAINST PUBLIC JUSTICE, CONSPIRACY
SECTIONS §182 AND §184

§182. Definition; punishment; venue

If two or more persons conspire:

1. To commit any crime.

2. Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime.

3. Falsely to move or maintain any suit, action or proceeding.

4. To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform such promises.

5. To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws.

6. To commit any crime against the person of the President or Vice President of the United States, the governor of any state or territory, any United States justice or judge, or the secretary of any of the executive departments of the United States.

They are punishable as follows:

When they conspire to commit any crime against the person of any official specified in subdivision 6, they are guilty of a felony and are punishable by imprisonment in the state prison for five, seven, or nine years.

When they conspire to commit any other felony, they shall be punishable in the same manner and to the same extent as

is provided for the punishment of the said felony. If the felony is one for which different punishments are prescribed for different degrees, the jury or court which finds the defendant guilty thereof shall determine the degree of the felony defendant conspired to commit. If the degree is not so determined, the punishment for conspiracy to commit such felony shall be that prescribed for the lesser degree, except in the case of conspiracy to commit murder, in which case the punishment shall be that prescribed for murder in the first degree.

If the felony is conspiracy to commit two or more felonies which have different punishments and the commission of such felonies constitute but one offense of conspiracy, the penalty shall be that prescribed for the felony which has the greater maximum term.

When they conspire to do an act described in subdivision 4 of this section, they shall be punishable by imprisonment in the state prison, or by imprisonment in the county jail for not more than one year, or by a fine not exceeding ten thousand dollars ($10,000) or both.

All cases of conspiracy may be prosecuted and tried in the superior court of any county in which any overt act tending to effect such conspiracy shall be done.

§184. Overt act; venue

No agreement amounts to a conspiracy, unless some act, beside such agreement, be done within this state to

effect the object thereof, by one or more of the parties to such agreement and the trial of cases of conspiracy may be had in any county in which any such act be done.

PLAINTIFFS' JURY INSTRUCTIONS REFERENCED IN PETITION FOR CERTIORARI

BAJI 3.45 (1988 Revision)
NEGLIGENCE PER SE-VIOLATION OF STATUTE, ORDINANCE, OR SAFETY ORDER

If you find that a party to this action violated _____ the [statute] [ordinance] [regulation] just read to you [and that such violation was a [legal] cause of injury to another or to himself], you will find that such violation was negligence [unless such party proves by a preponderance of the evidence that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law. In order to sustain such burden of proof, such party must prove by a preponderance of the evidence that he was faced with circumstances which prevented compliance or justified noncompliance with the [statute] [ordinance] [regulation]].

USCS TITLE: 33 SECTION 402,403
43 SECTION 1311

CALIFORNIA INDUSTRIAL CODES:

5020	5025	5051
4999	5008	5008(c)

TITLE 8 ART.31: 3800

VEHICLE CODES:
17000 (section 335)
17001

D.M.V. 2.2520

C.C.'s:

2194	2195	1668

GOVERNMENT CODES:

818.8	835.2(a)	835.2(b)
831	835(a)	835(b)
840.4(a)	815.2(a)	831.4(c)
830.4	830.8	830.6

BAJI 3.77

CONCURRING CAUSES

There may be more than one [legal] cause of an injury. When negligent conduct of two or more persons contributes concurrently as [legal] causes of an injury, the conduct of each of said persons is a [legal] cause of the injury regardless of the extent to which each contributes to the injury. A cause is concurrent if it was operative at the moment of injury and acted with another cause to produce the injury. [It is no defense that the negligent conduct of a person not joined as a party was also a [legal] cause of the injury.]

BAJI 3.78

CONCURRING CAUSES
EITHER CAUSE ALONE SUFFICIENT

Where two causes combine to bring about an injury and either one of them operating alone would have been sufficient to cause the injury, either cause is considered to be a [legal] cause of the injury if it is a material element and a substantial factor in bringing it about, even though the result would have occurred without it.

BAJI 3.80

CONCURRING CAUSES
EITHER CAUSE ALONE SUFFICIENT

If the plaintiff establishes by a preponderance of the evidence all of the facts necessary to prove (a) that each of the defendants was negligent, and (2) that the negligent act of one of the defendants was a [legal] cause of plaintiff's injury, and (3) that the injury was such that it could only result from the negligent act of one of the defendants, and (4) that from the circumstances of the accident the plaintiff cannot reasonably establish which defendant's negligence was a [legal] cause of the injury, then you will find that each defendant is liable for plaintiff's injury.

However, under such circumstances, a defendant is not liable if he establishes by a preponderance of the evidence all of the facts necessary to prove that his negligence was not a [legal] cause of plaintiff's injury.

BAJI 3.76

LEGAL CAUSE-DEFINITION OF

Requested by Defendant, given as modified:

A legal cause of [damage] is a cause which is a substantial factor in bringing about the [damage].

BAJI 11.53

PUBLIC ENTITY LIABILITY-
DANGEROUS CONDITION OF PUBLIC PROPERTY-
WHAT PLAINTIFF MUST PROVE
AGAINST PUBLIC ENTITY

Before the plaintiff may be entitled to your verdict [against defendant Port San Luis Harbor District], you must find from a preponderance of the evidence:

1. That Mobile Boat Hoist Facility was in a dangerous condition on October 11, 1985;

2. That the injury of which plaintiff complains was [legally] caused by the dangerous condition;

3. That the injury occurred in a way which was reasonably foreseeable as a consequence of the dangerous condition of the property; and

4. That either:

(a) The dangerous condition was created by a negligent or wrongful act or omission of an employee of the Port San Luis Harbor district, acting within the scope of his employment, or

(b) The Port San Luis Harbor District had actual or constructive notice of the dangerous condition a sufficient time prior to the accident so that measures could have been taken to protect against dangerous condition.

PLAINTIFFS' PROPOSED JURY INSTRUCTIONS
(BAJI 14.22 1986 REVISION)
MEASURE OF DAMAGES-PERSONAL PROPERTY-
LOSS OF USE

Reasonable compensation to plaintiffs, Donald B. Gates and Eva M. Gates, for being deprived of the use of their sailboat/home during the time reasonably necessary for repairing the damage legally resulting from the accident. In determining that amount you may consider the reasonable rental value of the sailboat/home for the period of time just mentioned. This is economic damage.

Further, plaintiffs, Donald B. Gates and Eva M. Gates may be reasonably compensated for the five (5) years of actual loss of use in regards to the following if it is proven that the loss of use was caused by defendants negligence.

(1) use of their vessel/home in the continuation of their retirement;

(2) Use of revenue from the sale of Endless III;

(3) loss of use of the interest from lost revenue;

(4) loss of use of interest on withdrawn funds, expended due to prolonged litigation;

(5) use of the vessel in continuation of cruising, either domestic or foreign;

(6) use of the vessel from October 11, 1985 through December 1990, as a dry, comfortable, unmoldy home, which all persons are reasonably entitled to.

Authorities: Baji 14.22 (as Modified)

EXCULPATORY CLAUSE IN CONTRACT
NOT A DEFENSE

Requested by Plaintiff:

In this action, defendant Port San Luis Harbor District has alleged as a defense to its liability for plaintiffs' damages and loss, the exculpatory or "hold-harmless" clause in the contract executed by plaintiff Donald Gates and defendant Port San Luis Harbor District.

I now instruct you that, as a matter of law, the defendant Port San Luis Harbor District cannot limit its liability or that of its agents and employees against its own negligence by the language in this contract and that any language or evidence to that effect would be void. Accordingly, you must disregard and give no effect or weight whatsoever to that language in the contract in determining liability and damages.

Authority: Tunkl v. Regents of the University of California, 60 Cal.2d 97, at 95 (1963) [citing England v. Lyon Fireproof Storage Co., 94 Cal.app.562 (1928)]; Civil Code §§1668,2175; see, generally, discussion in plaintiffs' Supplemental Memorandum Re Exculpatory Clause, dated December 26, 1990.

Given as requested by Defendants:

DEFENDANTS' PROPOSED JURY INSTRUCTION NO.

EXCULPATORY CLAUSE IN CONTRACT
AS A DEFENSE

In this action, defendants have alleged as a defense to their liability for plaintiffs' damages and loss, the exculpatory or "hold-harmless" clause in the contract executed by plaintiff Donald Gates and defendant Port San Luis Harbor District. I will now instruct you on the law as it pertains to this defense.

An exculpatory or "hold-harmless" clause is a clause contained in a contract which is intended by the parties to limit a party's liability in the event that one party should negligently cause damage or injury to the other party.

Parties to a contract are free to insert such clauses in a contract. A party who by contract agrees to accept a risk of harm arising from the other party's negligence cannot recover for such harm. The law recognizes such clauses as valid so long as the clauses are not contrary to public policy.

The exculpatory language purporting to excuse defendants from liability for damages may stand and be enforced only if it does not involve or affect the "public interest". An attempted exemption from liability affects the public interest and is invalid if the transaction exhibits some or all of the following characteristics:

1. It concerns a business of a type generally thought suitable for public regulation.

2. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.

3. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards.

4. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services.

5. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence.

6. Finally, as a result of the transaction, the person or property of the plaintiff is placed under the control of the defendant, subject to the risk of carelessness by the defendant or his agents.

PORT SAN LUIS HARBOR DISTRICT CONTRACT

MOBILE BOAT HOIST WORK ORDER
Haul-out date: 10/11/85

Boat Owner or Agent:D.B. Gates

Boat Name:Endless III
Boat #:556910

ROUND TRIP: Includes up, down, setting, blocking on shore and 1 hour for bottom cleaning of vessel.

TERMS

All bills due and owing to Port San Luis Harbor District and all bills due and owing to any Harbor concessionaires MUST BE PAID PRIOR TO LAUNCHING. The boat owner or agent understands that by signing this ways and laytime work order, his boat will not be launched if either the District and/or its concessionaires has a claim outstanding against said boat for goods or services rendered in connection with said boat.

I understand I am responsible for the above boat, her personnel and equipment while she is on the mobile hoist or Harbor lands. I understand the Harbor District, agents or personnel are not liable for damage to my vessel while it is on Harbor District property or in hoist slings. In no way do I consider the Harbor District as an insurer. I am liable for any damages. To prevent damage, I am not to revolve my propeller in the hoist pier. If the Harbor District is required to incur court costs and/or

attorney's fees to collect amounts due under this agreement, I promise to pay those court costs and attorney's fees.

I have read and understand all costs, terms and conditions.

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

APPEAL FROM THE SUPERIOR COURT OF
THE COUNTY OF SAN LUIS OBISPO
HONORABLE R. DONALD CHAPMAN, JUDGE

DONALD B. GATES AND EVA M. GATES
PLAINTIFFS,

VS.

PORT SAN LUIS HARBOR DISTRICT, ET AL.,
DEFENDANTS

SUPERIOR COURT SLO NO. 61331

TRANSCRIPT ON APPEAL
Excerpts - Volume I

APPEARANCES OF COUNSEL:
FOR THE PLAINTIFFS:
DONALD B. AND EVA M. GATES
IN PROPRIA PERSONA

FOR THE DEFENDANTS:
SINSHEIMER, SCHIEBELHUT & BAGGETT
ATTORNEYS AT LAW
1010 PEACH STREET
SAN LUIS OBISPO, CALIFORNIA 93401

BY: STEVEN J. ADAMSKI, ESQ.

REPORTED BY: SHEILA A. SMITH
RPR-CSR #6858

THE COURT: ". . . HE ENTRUSTED IT TO THE

HARBOR DISTRICT. IT WAS HAULED OUT OF THE

WATER AND ALLEGEDLY THROUGH THE CARELESSNESS OF A LINE HANDLER, THE BOAT WAS DAMAGED. ON THE FIRST READING OF PELLETIER, IT WOULD APPEAR TO ME THAT ALL SIX FACTORS OF TUNKL HAD BEEN MADE OUT IN A PRIMA FACIA MATTER BY WHAT HAS BEEN STATED TO ME SO FAR THIS MORNING HERE IN THAT CASE AND I'LL LET YOU ADDRESS IT."

MR. ADAMSKI: OKAY, YOUR HONOR. TWO THINGS. ONE, I'LL ADDRESS THE ISSUES AS THEY RELATE TO TUNKL. I DO WANT TO CALL TO THE COURT'S ATTENTION SOME CODE PROVISIONS IN THE CIVIL CODES THAT ARE MORE SPECIFIC TO OUR FACTS. AND THOSE ARE CIVIL CODE SECTION 2174 AND CIVIL CODE SECTION --

THE COURT: HOLD ON. 2174?

MR. ADAMSKI: 2174 AND 2175. ADDRESSING THE ABILITY OF COMMON CARRIERS WHICH IS WHAT HAD BEEN ALLEGED IN THIS CASE. WHAT WE'RE --

THE COURT: SAY THAT AGAIN?

MR. ADAMSKI: THE ALLEGATION HAS BEEN MADE IN THE BAILMENT CLAIM THAT WE ARE A COMMON CARRIER. THE NATURE OF WHAT WE DID WAS CARRIAGE. WE LIFTED THE VESSEL UP AND TOOK IT -- IN FACT, WHAT HAPPENED, THERE'S A SPECIFIC CODE PROVISION IN THE CIVIL CODES THAT SAYS THAT A COMMON CARRIER CAN LIMIT BY SPECIAL CONTRACTS THEIR OBLIGATIONS. AND 2175 SPECIFIES THAT YOU CANNOT LIMIT BY SPECIAL AGREEMENT OR ANY AGREEMENT FOR GROSS NEGLIGENCE, FRAUD, OR WILFUL WRONGS.

IT DOESN'T INCLUDE NEGLIGENCE. SO I THINK IN THIS CONTEXT OF THIS CASE WHERE YOU HAVE A COMMON-CARRIER SITUATION, YOU HAVE SPECIFIC CODE PROVISIONS THAT ADDRESS THIS ISSUE AND I WOULD PUT FORTH TO THE COURT THAT THE SPECIFIC PROVISIONS WOULD SUPERSEDE THE GENERAL PROVISIONS

THAT'S BEEN CITED IN TUNKL AND IS THE SOURCE OF THAT LINE OF AUTHORITY. SO I THINK THAT RIGHT THERE RESOLVES THE MATTER ON BEHALF OF MY CLIENTS.

THE COURT: HOW DO YOU LOOK AT LIFTING THE BOAT OUT OF THE WATER AS BEING A COMMON CARRIER?

MR. ADAMSKI: AGAIN, PLAINTIFFS HAVE ALLEGED US AS A COMMON CARRIER. I'M ASSUMING IT'S STIPULATED AS A FACT THAT WE WERE. COMMON CARRIERS -- CASE LAW HAS FOUND THAT SKI LIFTS ARE COMMON CARRIERS.

THE COURT: WHAT ARE?

MR. ADAMSKI: SKI LIFTS. THAT NOZZLES IN GAS STATIONS ARE A COMMON CARRIER. THAT COMMON CARRIERS WHO HAVE -- IT MATCHES SEVERAL OF THE ELEMENTS OF THE TUNKL CASE. YOU OFFER YOUR SERVICES TO THE PUBLIC IN GENERAL AND YOU MOVE. AND THE NATURE OF THIS PARTICULAR --

THE COURT: EXCUSE ME.

MR. BAILIFF, WOULD YOU GET THE WEST ANNOTATED CODES FOR CIVIL CODE SECTION -- WHAT IS IT?

MR. ADAMSKI: 2174 AND 2175.

THE COURT: 2174

MR. ADAMSKI: YOUR HONOR, IF I COULD -- IF I COULD SHOW YOU A PICTURE OF WHAT GOES ON IN THIS OPERATION, IT MAY GIVE YOU A --

THE COURT: I HAVE A PICTURE IN MY MIND.

MR. ADAMSKI: WHAT WE HAVE, YOUR HONOR, IT'S CALLED A "MOBILE BOAT HOIST." THE REASON NOT ONLY DOES IT LIFT THE BOAT OUT OF THE WATER, BUT THE HOIST IS ON WHEELS AND THEN TRANSPORTS THE BOAT TO THE SHIPYARD FOR WORK.

SO IT HAS WHAT I WOULD CONTEND TO BE ALL THE CHARACTERISTICS OF A COMMON CARRIER. AND THAT'S WHAT'S BEEN ALLEGED BY PLAINTIFFS AS WELL, WHICH I THINK IS A

GENERAL DISTINCTION BETWEEN THE MOORING CASE.

THE COURT: I SEE A 1941, SAYING AN OPERATOR OF AN ESCALATOR IS A COMMON CARRIER. OBVIOUSLY, A TAXICAB FOR HIRE. JUST ANY BUS, PASSENGERS FOR HIRE.

MR. ADAMSKI: I BELIEVE, YOUR HONOR,IT'S ALREADY BEEN FOUND THAT ELEVATORS ARE COMMON CARRIERS AS WELL.

THE COURT: AND THAT COMES UNDER THE CATEGORY OF PEOPLE OF COMMON CARRIERS? UNDER THE CATEGORY OF PROPERTY OF COMMON CARRIERS? I DON'T SEE ANYTHING CLOSE TO WHAT YOU'RE TALKING ABOUT HERE, MOSTLY THAT WAS TRANSPORTATION OF GOODS.

MR. ADAMSKI: I'M INTERESTED IN SEEING IF I COULD FIND THE GARAGE LIFT. I DON'T HAVE THAT, YOUR HONOR.

THE COURT: WHY DON'T YOU -- IT POPPED RIGHT OUT OF YOUR MOUTH HERE THIS MORNING.

MR. ADAMSKI: THERE'S BEEN A LOT OF RESEARCH ON THIS CASE AND I DO RECALL THAT.

THE COURT: CALIFORNIA CASE HOLDING THAT?

MR. ADAMSKI: TO THE BEST OF MY RECOLLECTION, YOUR HONOR, AND AGAIN, I APOLOGIZE FOR NOT BEING PREPARED TO RESPOND TO THE MOTION BETTER THAN I AM. I BELIEVE IT WAS A LARGE HOIST CASE. THAT COULD BE MY OWN WISHFUL THINKING OF THE INITIAL RESEARCH WE DID ON THIS ISSUE TWO OR THREE YEARS AGO.

THE COURT: LET'S LEAVE THE COMMON CARRIER BUSINESS OUT OF IT FOR A MOMENT. YOU'RE GOING TO HAVE TO COME UP WITH SOMETHING TO ALLOW FACTS TO COME INTO THE CASE BEFORE I'LL HOLD LIFTING A BOAT IS A COMMON CARRIER.

MR. ADAMSKI: IT'S ALLEGED AS A CAUSE OF ACTION, SO IF THE RULING IS IT'S NOT,

WE NEED TO DISMISS AT LEAST PARTS OF THAT ACTION. BUT AS TO THE TUNKL LINE DECISIONS, I THINK THE KEY ISSUE IN TUNKL AND THE KEY ISSUES AT FAULT THROUGHOUT -- AND I THINK THE ONE THAT YOU HIGHLIGHTED IN THE CASE THAT YOU READ IS THERE IS NO OTHER OPTION AVAILABLE.

THE TUNKL CASE ITSELF, AND I THINK THE KEY LANGUAGE INDICATED THAT A PERSON AT A WAITING ROOM HAS NO OTHER OPTION. THEY'RE GIVEN A WAIVER CLAUSE AND AS THE CARD SAID, THEY CAN'T IN LIEU OF AN AGREEMENT FIND ANOTHER HOSPITAL. AND THAT'S ON PAGE 60 CAL.2D, 102 WHERE THE COURT'S DISCUSSING THE NATURE OF THE RELATIONSHIP.

THE EXACT NECESSITY OF THE SERVICES AT THE PARTICULAR TIME SOMEBODY APPROACHES THE HOSPITAL. IN OUR CASE, WE'LL HAVE EVIDENCE THAT THE PLAINTIFFS COULD HAVE THEIR VESSEL LIFTED AT MORRO

BAY FOR SUBSTANTIALLY MORE THAN THE PORT SAN LUIS WOULD HAVE CHARGED AND WITHOUT A HOLD HARMLESS CLAUSE AT A PRIVATE FACILITY. AND MOST OF THESE FACILITIES ARE PRIVATE. AGAIN, THAT'S ALSO A DISTINCTION BETWEEN THE SLIPS AND THE BERTH BECAUSE MOST OF THOSE ARE PUBLIC.

THE COURT: IS THAT PRACTICAL NECESSITY FOR THE PLAINTIFFS TO HAVE THEIR VESSEL LIFTED OUT WHERE THEY WERE OR COULD THAT BOAT HAVE EASILY MADE ITS WAY TO MORRO BAY?

MR. ADAMSKI: THEY WERE IN MORRO BAY, YOUR HONOR, AND THEY LEFT MORRO BAY TO GO TO PORT SAN LUIS SOLELY FOR PURPOSES OF BEING LIFTED OUT OF THE WATER BECAUSE IT WAS THE MOST INEXPENSIVE PLACE TO DO IT. AND TH EVIDENCE WILL SHOW THAT THIS ELEMENT FOR THE PUBLIC THAT IS NEEDED SERVES A WIDE VARIETY OF SERVICES UP AND

DOWN THE COAST FROM MONTEREY TO SANTA BARBARA.

THE COURT: START AGAIN, PLEASE.

MR. ADAMSKI: I'M SORRY. THE PUBLIC THAT AVAILS THEMSELVES OF PORT SAN LUIS' SERVICES OF HAULING OUT OF VESSELS CONSIDERS A WIDE VARIETY OF OTHER PLACES. THEY TRAVELED SOME DISTANCE TO PORT SAN LUIS TO BE HAULED OUT JUST BECAUSE OF THE INEXPENSIVE NATURE OF THEIR HAULOUT.

THEY HAVE OPTIONS, SANTA BARBARA, VENTURA, MONTEREY. AS I SAID, THE HOME PORT OF THE PLAINTIFFS IS MORRO BAY ITSELF. THEY COULD HAVE BEEN HAULED OUT THERE. THEY COULD HAVE PAID AN ECONOMIC PRICE FOR THAT HAULOUT.

THE COURT: FOR THE ADDITIONAL PROTECTION?

MR. ADAMSKI: FOR THE ADDITIONAL PROTECTION AS I UNDERSTAND IT. THEY HAVE CONTRACTS WITH HOLD HARMLESS CLAUSES AND

DECIDED IT'S NOT WORTH IT, RATHER CHARGE MORE. IN OUR CASE, IT'S AN IMPORTANT ELEMENT OF THE SERVICE THAT WE PROVIDE.

THE OTHER THING THAT I READ IN TUNKL AND HAS BEEN IN THE CASES, WE DO CHARGE A SERVICE AND THIS HOLD HARMLESS IS APPLIED TO ALL EQUALLY. IN TUNKL, AN ARGUMENT WAS MADE AT LEAST TO THE CHART AND CASES THE PEOPLE THAT DON'T PAY MONEY. AND THE COURT FOUND WHAT WOULD BE PUBLIC POLICY. THOSE THAT CAN'T PAY, SHOULDN'T AS AN ELEMENT TO THE SERVICE.

THE PORT SAN LUIS DOESN'T DO THAT. WE DON'T GRADE PEOPLE BASED ON THEIR FINANCIAL NEED. WE APPLY A LOW CHARGE TO EVERYBODY. WE DON'T USE WHATEVER ECONOMIC ADVANTAGE WE HAVE TO EXERT A HIGHER COST FOR THESE INDIVIDUALS. WE USE THE BILLING TABLE OF THE HOLD HARMLESS CLAUSE TO BENEFIT THE PUBLIC AS A WHOLE TO PROVIDE A BROADER

RANGE OF SERVICES TO A BROADER RANGE OF PEOPLE. SO I THINK THAT'S NOT -- THAT ISSUE WAS NOT ADDRESSED IN TUNKL.

THE COURT: WHAT ISSUE DO YOU THINK THE JURY WOULD DECIDE IN THIS CASE?

MR. ADAMSKI: WELL, I THINK -- YOUR HONOR, I THINK THE FACTS AS I EXPLAINED TO YOU THE FACTS THAT ARE OPTIONS AVAILABLE. THE FACT THAT WE DON'T GET MONEY ON THAT, THAT'S EVIDENCE THAT WE NEED TO PRESENT TO BE ABLE, AND I THINK WE'LL REPRESENT TO THE COURT TO DISPUTE IT ON THE POLICY. I BELIEVE THAT.

I THINK THE ISSUE OF THE ENFORCEABILITY OF THIS PARTICULAR CLAUSE WOULD ORDINARILY BE GIVEN TO THE JURY BECAUSE I THINK THE PLAINTIFFS ARE GOING TO DISPUTE THAT LANGUAGE --

THE COURT: COVERS NEGLIGENCE OF THE EMPLOYEES?

MR. ADAMSKI: -- COVERS THE SITUATION THAT WE HAVE IN THIS CASE. AND I THINK THAT WE HAVE EVIDENCE TO THE CONTRARY. I THINK THE DOCUMENT SPEAKS FOR ITSELF AND I ALSO THINK FOR THE PLAINTIFFS, ESPECIALLY MR. GATES' OWN TESTIMONY, WILL ESTABLISH THAT HE UNDERSTOOD EXACTLY NOT ONLY WHAT IT COVERED BUT THE TIME FRAME WHICH IT COVERED.

HE TESTIFIED THAT HE FELT THEY WERE NOT RESPONSIBLE FOR ANYTHING THEY DID AT THE TIME THEY FIRST THREW THEM THE LINE UNTIL THEY PUT IT BACK IN THE WATER. HE READ THE AGREEMENT. HE UNDERSTOOD IT. HE SIGNED IT. AT THE TIME HE SIGNED IT, HIS BOAT WAS STILL IN MORRO BAY. IT WASN'T THAT HE GOT TO PORT SAN LUIS TO HARBOR OUT, BUT HE MADE WHAT I BELIEVE WAS AN ECONOMIC CHOICE.

THE COURT: ANYTHING ELSE YOU WISH TO SAY?

MRS. GATES: YES, YOUR HONOR. I BELIEVE THAT COUNSEL IS MISTAKEN. OUR BOAT WAS NOT IN MORRO BAY WHEN THE CONTRACT WAS SIGNED. THE CONTRACT WAS SIGNED ON OCTOBER 9TH. WE HAD SAILED TO PORT SAN LUIS ON OCTOBER THE 5TH AND WERE THERE FOR THE WEEK BEFORE THE HAULOUT. I ALSO BELIEVE HE'S MISTAKEN WHEN HE STATES THERE WERE OTHER BOATYARDS AVAILABLE IN 1985.

MORRO BAY BOATYARD WAS NOT IN OPERATION. I THINK IT WAS TIED UP WITH A DAMAGED VESSEL. NOBODY ELSE COULD BE HAULED THERE. PORT SAN LUIS WAS THE NEAREST FACILITY. IT WOULD NOT MAKE SENSE TIMEWISE OR ANYTHING TO GO TO SANTA BARBARA OR MONTEREY WHEN PORT SAN LUIS IS VERY NEAR BY.

I THINK AS FAR AS EXCULPATORY, FIRST AND FOREMOST, THE PORT SAN LUIS HARBOR DISTRICT IS A PUBLIC ENTITY AND IF YOU WANT TO GET INTO THE COMMON CARRIER, THEY HAVE FURTHER VIOLATED CALIFORNIA INDUSTRIAL SAFETY CODE 4999 IN THAT THEY HAVE PEOPLE STANDING ON THE DECK WHEN THEY LIFT THOSE LOADS.

FURTHER, THEY HAVE VIOLATED VEHICLE CODE -- THE MOBILE BOAT HOIST IS A VEHICLE AND UNDER 17001, THEY WAIVE -- IT WAIVES ALL IMMUNITY. AND FURTHER, I UNDERSTAND THAT THE DEPARTMENT OF MOTOR VEHICLES REQUIRES THEM TO BE REGISTERED AND THEY ARE NOT.

THE COURT: YOU WISH TO RESPOND TO THESE?

MR. ADAMSKI: I'M NOT SURE WHAT THE RELEVANCY OF ANY OF THE LAST STATEMENTS THAT SHE HAS MADE. THE FIRST STATEMENTS THAT THEY WERE AT THE HARBOR, THAT MAY BE

CORRECT AND I COULD BE MISTAKEN ON THAT. THEY DID MADE A RESERVATION. THE CONTRACTS WERE AVAILABLE FOR THEM TO LOOK AT THERE AT THE FRONT DESK. IT'S NOT A WAIVER OF ANY VIOLATIONS OF ANY OF THESE REGULATIONS. I DON'T KNOW THAT THEY'RE EVEN RELEVANT TO THE FACTS IN THIS CASE.

THE COURT: MATTER SUBMITTED?

MRS. GATES: YES, YOUR HONOR. MR. GATES WAS NOT PROVIDED WITH A COPY OF THE CONTRACTS. THIS CONTRACT HAS BEEN PRESENTED TODAY. IT IS ONE PAGE THERE ON THE FRONT AND BACK. IT IS NOT TWO SEPARATE PIECES. THE FIRST TIME MR. GATES SAW THIS CONTRACT WAS WHEN IT WAS BROUGHT TO HIM BY MARLIN STEBBINS, THE DISTRICT SUPERINTENDENT OF MAINTENANCE AND OPERATIONS. I BELIEVE THAT DATE WAS NOVEMBER 25TH, WHICH WAS WELL OVER A MONTH AFTER THE HAULOUT.

HE DID NOT AGREE TO THIS. HE QUESTIONED HAVING TO SIGN THE CONTRACT. AND I BELIEVE COUNSEL IS MISTAKEN IN STATING THAT MR. GATES UNDERSTOOD ALL OF THIS. AND HE DID NOT TESTIFY TO THIS IN HIS DEPOSITION. HE DIDN'T AGREE TO ALL OF IT. HE DIDN'T THINK THAT IT WAS THE RIGHT THING TO HAVE TO DO. AND I THINK THAT THE TESTIMONY AND THE EVIDENCE WILL SHOW THAT.

THE COURT: THE MATTER SUBMITTED?

MR. ADAMSKI: SUBMITTED, YOUR HONOR.

THE COURT: THE MOTION IS DENIED AS TO YOUR THIRD ITEM. I HAVE STARTED OUT IN ASKING MY QUESTIONS OF MR. ADAMSKI THAT IT SOUNDED TO ME LIKE ON THE FACE OF IT THE PELLETIER CASE WOULD BE GOVERNING. IT'S NOW OBVIOUS TO ME IT'S LARGELY A QUESTION OF FACTS. IT MAY BE A POINT IN THE TRIAL. IT MAY BE OTHER MOTIONS THAT CAN BE MADE.

I'M NOT FORECLOSING ANY PARTY FROM MAKING AN APPROPRIATE MOTION AT ANY TIME, THAT THEY APPEAR TO BE TIMELY. BUT IT SEEMS TO ME THAT IT'S AN ESSENTIAL PART OF THE CASE AND YOUR'RE ENTITLED TO QUESTION THE JURY AS . . . .

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

DONALD B. GATES and EVA M. GATES,
Plaintiffs

vs.

PORT SAN LUIS HARBOR DISTRICT, et al.,
Defendants

Case No. 61331 Date: August 13, 1986

OFFER TO ALLOW JUDGMENT (CCP §998);
ACCEPTANCE; REQUEST TO ENTER JUDGMENT

TO: PORT SAN LUIS HARBOR DISTRICT AND ITS ATTORNEYS OF RECORD:

Under Code of Civil Procedure Section 998, plaintiffs offer to allow judgment to be taken in this action against defendant PORT SAN LUIS HARBOR DISTRICT in the sum of $83,999.

If you accept this offer, please date and sign the acceptance form below and file this paper with the Clerk of this Court who will enter judgment accordingly.

WENDT, RONCA & WOOLPERT
/s/Karen Scholer Gray
Attorneys for Plaintiffs

§ 1503. Influencing or injuring officer or juror generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

§ 1505. Obstruction of proceedings before departments, agencies, and committees

Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Acts, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or

Whoever corruptly, or by threats or force, or by any threatening letter of communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States,or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress-

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.